

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

MARINE SPACE ENCLOSURES, INC.

v.

FEDERAL MARITIME COMMISSION

No. 22,936

APPENDIX

RECEIVED

MAY 27 1969

CLERK OF THE UNITED
STATES COURT OF APPEALS

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 30 1969

Nathan J. Paulson

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BEFORE THE
FEDERAL MARITIME COMMISSION

In the Matter of
FMC Agreements Nos. T-2271, T-2272

PROTEST OF MARINE SPACE ENCLOSURES, INC.

Come now Marine Space Enclosures, Inc. by their attorney
and show:

1. Protestants are a corporation doing business in the State of New York. Leading a consortium of prominent technical and production associates, they have in active preparation plans to construct on the waterfront of the City of New York a major complex of dwelling, hotel and office units, built over sub-aqueous parking, and ancillary facilities. Such plans include as an integral part construction of an advanced terminal for the world's great passenger liners. Planning officials of New York have in writing expressed "enthusiastic interest" in these plans, and preliminary consultations have begun. Protestants intend and expect to press forward actively and promptly.

2. Protestants have proposed that their complex should be constructed on the Hudson River between 46th and 49th Streets, New York City, but this site, though undoubtedly the most suitable, is not the only one at which it could be advantageously developed. An essential economic factor, however, is that

passenger vessels should be free to employ its constituent terminal.

3. The City of New York is the owner of waterfront facilities and land within its physical jurisdiction suitable for use as vessel terminals, including passenger vessels.

4. Historically, the City has constructed such terminals and leased them for operation to various terminal companies or vessel operators.

5. As of January 15, 1969, the City entered into agreements with the Port of New York Authority [FMC No. T-2271], and with the Authority and (apparently) 18 steamship operators and agents providing substantially all major known passenger liner service having terminus in New York [FMC T-2272], which agreements contain the following terms, among others:

(a) The City will finance and the Port Authority will construct at an estimated cost exceeding \$60 million, and thereafter the Authority will lease and operate, a new passenger-vessel terminal on the Hudson River in the area of West 45th - 51st Streets. The original term of lease of this terminal is 20 years [T-2271 par. 3]. Pending completion of this permanent structure, four existing piers at separated sites are to be leased to the Authority for operation as an interim terminal.

(b) The carriers agree that they will use the interim premises until the permanent terminal is ready, and that thereafter for 50 years after expiration of the original term of the lease of such permanent terminal, that is, for a period of

70 years, they will not (except in emergency) use any other terminal of any type in the Port of New York [T-2272 par. 3]. The City agrees to cancel existing obligations of these lines to use other of its facilities [T-2272 par. 1]. All passenger carriers may join in the agreement by becoming signatories, but none may use the facilities without so joining [T-2272 par. 9]. The City and the Authority promise never to authorize the use for passenger operations of any other property within their control, or to permit structures suitable for such operations to be provided anywhere in their jurisdiction, whether by new construction or alteration, the Authority agreeing to indemnify the City for any legal damages to which it may be adjudged liable on account of its refusal of such authorization or permission [T-2271 par. 31(a)]. They promise not for 70 years to promote, finance, establish, construct, operate or maintain any other passenger terminal facility, or to authorize any other person to do so [T-2271 par. 31(b)]; and they agree to exact an undertaking from all passenger-ship operators to use no other facility in New York [T-2271 par. 31(c)].

6. Under the terms of these agreements the City must and will deny to the protestants land, piers, wharves, work permits and licenses necessary to acquire, construct, reconstruct, operate or maintain passenger-vessel terminal facilities, which are an integral part of the development plans of protestants; and all passenger-ship operators, whether or not at present signatories of these agreements, will be penalized if they

patronize any such facilities of protestants located anywhere within the jurisdiction of the City or the Authority. The protestants are therefore effectually precluded from proceeding with their plans so far as they include and depend on a passenger-ship terminal.

7. Agreements Nos. T-2271 and T-2272 are agreements between common carriers and other persons subject to the Shipping Act, 1916 for the purpose of controlling, regulating, preventing and destroying competition among terminal operators to provide passenger facilities, and among carriers in the use of such facilities. The City undertakes to prevent any other terminal operator, existing or prospective, from furnishing, and to prevent any carrier from patronizing, any passenger facilities, existing or prospective, other than the exclusive facilities contemplated by said agreements. The carriers promise not to patronize any other facilities.

The object of these agreements is apparent. The motive of the City is to underwrite the huge investment it is about to make by compelling the exclusive patronage of all potential users. The motive of the lessee is to underwrite its obligation to the City, namely, to pay off the latter's investment with interest in 20 years, by compelling the exclusive patronage of all potential users. The motive of the carriers is to insure that if they must yield up exclusive patronage, no competitor shall now or hereafter be able to procure terminal facilities cheaper or better than those which the agreements will provide.

Compare Agreements No. T-2108, 2108A, 10 SRR 556 (Initial Decision 1968); Agreement No. T-2138, 10 SRR 571 (Initial Decision 1968).

These provisions, including those summarized in paragraph 5 hereof, will prevent the development of additional superior terminal facilities contemplated by protestants or by any other person, now and for 70 years, and may well discourage the wealth and variety of steamship services, including passenger services by sea, which have traditionally characterized the Port of New York and are essential for the health of that sector of our commerce, all to the detriment of the commerce of the United States and contrary to the public interest in violation of §15 of the Act. Further, they violate §15 in the respect that (a) they confer upon the Port Authority undue and unreasonable preference and advantage, and subject protestants to undue and unreasonable prejudice and disadvantage in violation of §16 First of the Act; (b) carriers, barred from using alternative facilities and penalized if they do so by absolute exclusion from the Authority's premises, will thereby be subjected to unjust discrimination and unfair treatment; and (c) such carriers will be subjected to undue and unreasonable prejudice and disadvantage in violation of §16 First. *Ballmill Lumber and Sales Corp. v. Port of New York Authority*, 10 SRR 131 (FMC 1968); cf. *Salveson v. West Mich. Dock*, 10 SRR 745 (FMC 1968).

8. So far as concerns the public-interest clause, the present status of the law, as enunciated by the Commission and the Supreme Court, is that agreements which on their face contravene the antitrust policy of the United States are presumptively contrary to the public interest within the meaning of §15. *FMC v. Svenska*, 390 U.S. 238 (1968); see Agreements Nos. T-2108, 2108A, *supra*; Agreement No. T-2138, *supra*. The practical effect of this presumption is that the proponents of such agreements must come forward with convincing evidence of special transportation conditions requiring the exemption of §15 to be extended to them. Agreement No. 8660 - Contract Rate System, 10 SRR 811, 817-818 (FMC 1969).

In the present case, the terms of the agreements erect a classical restraint of trade in a peculiarly pernicious form: no one is to be allowed to construct independent terminals; there is to be one terminal only, to be leased to one operator only, to the exclusion of all competitors, existing or potential; carriers are to be dragooned not merely by the physical fact that there will be no other terminal, but by an explicit promise of 70-years' exclusive patronage on pain of being excluded from that unique facility. That the parties well understand the dubious nature of their undertakings is shown by the clause under which the Port Authority indemnifies the City for any damages the latter may be found to have inflicted on independent interests in enforcing the agreements [T-2271 par 31(a)].

On their face, these agreements violate the antitrust laws, and are therefore presumptively contrary to the public interest within the meaning of §15. How heavy the burden will be of overriding this presumption, the cases cited above already show: the Commission has not looked with approval upon demands for exclusive patronage by terminal operators, including municipal authorities, where the only alleged justification (which can be urged in any trust violation) is the desire to protect an investment.

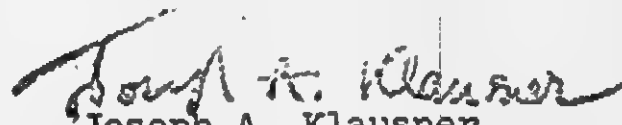
9. So far as concerns detriment to commerce, the agreements intend on their face to throttle development during 70 years of essential maritime facilities and to eliminate all independent sources of improvement from competition. The dangers to commerce are self-evident from so complete and so prolonged a suppression of the accepted market mechanism for commercial improvement. Nor is the danger theoretical or abstract: the terminal plans of the protestants are jeopardized here and now. The destruction of their project will be a concrete detriment to commerce proximately caused by the agreements, if they are permitted to go into effect. Here also the burden of justification will be heavy.

10. The prejudice and disadvantage to protestants are likewise self-evident, in the face of the unique and exclusive preference and advantage to be granted the Port Authority. Protestants are restrained from competing for the business of carriers with better or cheaper facilities such as they consider

they can furnish. Carriers are likewise disadvantaged by being compelled to forego alternative business opportunities, which might enable them or some of them to compete more successfully with one another or with air carriers, and by being compelled to use respondents' facilities, which there is reason to believe they consider to be outmoded before they are built.

WHEREFORE, protestants pray that Agreements Nos. T-2271 and T-2272 be disapproved as illegal on their face or in the alternative that they be set down for public evidentiary hearing in which protestants may participate as a party entitled to produce evidence and to examine and cross-examine witnesses. *Los Angeles v. FMC*, 388 F. 2d 582,583 (C.A.D.C. 1967), 8 SRR 20,082.

Respectfully submitted,



Joseph A. Klausner
Attorney for
Marine Space Enclosures, Inc.
1028 Connecticut Avenue, N.W.
Washington, D.C. 20036

March 11, 1969

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing first class mail, postage prepaid, a copy to each such party.

Joseph A. Klausner

Joseph A. Klausner

Washington, D. C.

March 11, 1969

BEFORE THE
FEDERAL MARITIME COMMISSION

In The Matter Of
FMC Agreements Nos. T-2271, T-2272

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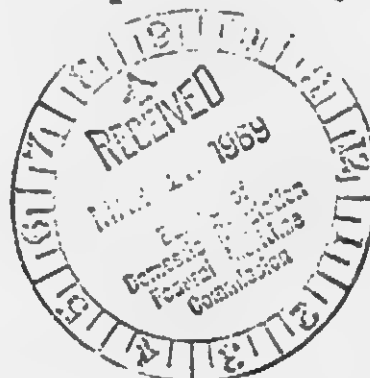
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PROTEST OF MARINE SPACE ENCLOSURES, INC.

The Port of New York Authority and The City of
New York, for Answer to the above captioned Protest, say:

In paragraph 1 of its Protest, Marine Space
Enclosures, Inc. discloses that its real interest in this
matter is that of a real estate developer. Stripped down
to its essentials, the Protest seeks to have the Commission
deny approval to the filed agreements so that if protestant
is, at some undisclosed future time, in a position to go
forward with a possible development incorporating a ship
terminal, it will be able to solicit occupancy thereof by
the steamship lines who have already agreed to occupy the
City/Port Authority Passenger Ship Terminal.

Although protestant is a "person" under the Act
and, therefore, may well be entitled, as a matter of law,
to file the instant protest, protestant is neither a carrier,
a shipper, a receiver or another person subject to the Act.



The interest of protestant which would be served by the grant of the relief it seeks has nothing whatsoever to do with shipping -- what is at stake is solely protestant's desire to engage, on a profitable basis, in a possible real estate venture. To serve that interest, protestant asks the Commission to prevent the immediate construction of a Passenger Ship Terminal which is urgently needed now in the public interest. It is also essential to the carriers who have agreed to make use of it because they believe it will contribute in substantial measure to the economic well-being of their industry at the Port of New York. Most significant in this regard is the fact that no carrier has protested the filed agreements.

In view of the foregoing, and of the further reasons hereinafter set forth, we respectfully urge that the public interest requires that the Commission approve the agreements in question as promptly as possible.

BACKGROUND

The pending agreements comprise a program participated in by the City of New York, The Port of New York Authority and the steamship lines operating passenger vessels in the Port of New York, under which a \$60 million modern, six-berth passenger ship terminal would be constructed with public funds. The resolutions by the governing body of the City and by the Port Authority approving the project and the agreements are attached to the filed agreements.

The planning of the facility is complete and construction could commence early in April of this year. The details of need for the terminal and the plan to provide it to the public are set forth in the attached reports entitled "A Plan for a New Consolidated Passenger Ship Terminal in the Port of New York - April 1967" (Marked "A") and the "Supplementary Report - September 1968" of the same title (Marked "B"). The Carriers and their passengers would, on completion of the Terminal in 1972, enjoy modern, efficient, climate-controlled facilities which would be ideal for comfortable, expeditious handling of the vessels, their passengers and visitors. The Carriers would not be required to undertake long-term fixed lease commitments; they would pay dockage and wharfage and passenger charges on an as-and-when-used basis, under a uniform tariff established by

the operator of the Terminal, The Port of New York Authority.

The City itself has been, for the last seven years, seeking carrier cooperation in the development of a new terminal on a firm lease basis.

Over the past three years the Port Authority, the City and the steamship lines have been working to bring the project to its present position of early commencement of actual construction. Throughout these years of study and discussion, the City and the Port Authority have made it clear to the Carriers that the former City requirement that each user execute a firm lease could be rescinded only if the new facility were utilized as a terminal consolidating all of the Carriers' passenger ship movements to and from the Port of New York. Lacking this concept of consolidated operations, the terminal plan could not possibly be financially feasible and, therefore, could not be effectuated either by the Port Authority or the City of New York.

Since the Carriers who presently lease City-owned piers for passenger operations are unwilling to sign long-term leases necessary to permit upgrading of the present piers, without the plan for the Consolidated Passenger Ship Terminal, the existing drafty, dilapidated, decrepit passenger piers would have to continue in use indefinitely.

This bleak prospect was viewed as a potentially serious deterrent both to the continuance of passenger ship

operations in the Port of New York and to the efforts of the Carriers to develop additional traffic volumes. Certainly such a situation would operate to the detriment of the commerce of the United States and to the public interest.

The agreements and the plan were the subject of three public hearing in New York City in late 1968 and early 1969. The Carriers supported the project at these hearings. It was not until a hearing held in December, 1968 that the public officials of the City and the Port Authority received any notice from the Protestant here, Marine Space Enclosures, Inc., that it had developed an alleged alternate plan.

For reasons detailed below, the responsible City officials rejected Protestant's plan as an alternate to the Consolidated Passenger Ship Terminal.

THE PROTESTANT'S SCHEME

The Protestant, through its principal spokesman, Mr. William Zeckendorf, did not, at the hearing referred to above, come forward with any definitive plan for a facility combining ship terminal, housing, hotel, office and other uses in a single structure. A rendering was displayed at the public hearing held by the City Council of the City of New York. This rendering called for construction on the same site as that proposed as the site of the City/Port Authority Terminal, a site owned by the City in which protestant has no property interest of any kind. Based on this rendering, and other similarly sketchy information made available, primarily through press accounts, protestant's scheme appeared impractical. No cost estimates were provided, nor was there any information as to the cost to the carriers for use of the facility, nor has protestant revealed any vessel operating plan, proposed tariff or other indication as to proposed lease or other commitments contemplated to be made by the carriers.

The structure shown on the rendering could not possibly provide six berths of sufficient length to accommodate the industry's requirements in this Port. It also appears that the concept necessarily involves use of experimental underwater construction of dubious potential value.

As just one example, the protestant's submission referred to subaqueous parking. A previous attempt to provide subaqueous parking in a pier structure was most unsatisfactory.

Aside from the fact protestant had no title to or real estate interest in its proposed site, from the standpoint of City planning, the structure shown on the rendering could not be constructed on the proposed site without precluding a salutary relationship proposed (and possible under the public plan) between the new terminal and the contemplated development of the adjoining neighborhood. The private plan of the protestant was depicted as a tall structure effectively blocking the surrounding neighborhood from any orientation to the waterfront and the passenger ship activity. The magnitude of the structure, conceived by the protestant for the range and scope of activities contemplated, would impose severe traffic and other burdens on areas adjoining such a project. The rendering of the protestant shows no method for handling these severe problems.

Finally, and most important, the responsible City officials who reviewed the protestant's concept, determined that at least a year would be required to study

its feasibility and its ultimate construction could not be commenced, if at all, for several years. They determined that the ship terminal project could not be delayed for this period without abandoning hope for the new terminal required in the public interest.

Protestant now seeks to have this Commission further review his scheme, presumably with a view to a determination that it is "superior" to the City/Port Authority proposal. It is respectfully submitted that review of real estate development plans is not a function of this Commission under the Act.

ALLEGED ILLEGALITY

The Protestant contends that the agreements are in violation of the antitrust laws and therefore of Section 15. By the terms of that Section, however, if your honorable Commission approves these agreements they are "excepted" from the provisions of the antitrust laws. The attached reports ("A" and "B") detail the special transportation and related conditions which fully warrant the "exception" here.

With respect to any alleged undue and unreasonable prejudice to the Carriers, it suffices to note that the agreements under consideration expressly provide that each user will receive identical treatment. Any possible doubt on this score is obviated by the "most favored nations clause" set forth in Paragraph 9 of Agreement T-2272.

The Protestant misconstrues the effect of the agreements for it is erroneously asserted that "no one is allowed to construct independent terminals." There is nothing in the agreement to prevent a public or private developer from constructing a new passenger ship terminal on property not now under the control of the Port Authority or the City of New York.

Accordingly, any Carrier not wishing to sign the agreement with respect to the Consolidated Passenger Ship Terminal is presently free to seek out accommodations at other locations in the harbor not affected by the mutual covenants to cooperate, entered into by the parties to these agreements.

The Protestant further misconstrues the agreements in suggesting that the Carriers will be forced to use facilities at the new terminal which will be "outmoded." Section 3 of Agreement T-2272 releases the Carriers from the covenant to continue to use the Consolidated Passenger Ship Terminal whenever the City or the Port Authority has failed to make "physical changes adequate to meet the requirement of industry-wide technological developments."

Insofar as Protestant alleges prejudice and disadvantage to them by allegedly thwarting Protestant's scheme, this would seem to be a statement of alleged interference with private property rights. If so, it is not a matter within the cognizance of the Federal Maritime Commission. Furthermore, if actual damage can be demonstrated by the Protestant, it is to be presumed that it will pursue any judicial remedies available to it under the law.

Finally, in this connection, it must be noted that approval of these agreements is not the end of this honorable Commission's powers with regard to them. Under the Act, the Commission has continuing power, after notice and hearing, to require such changes therein as may be required to insure, inter alia, the protection of the public interest and of the commerce of the United States.

CONCLUSION

In view of the widespread public knowledge of the plan for the Consolidated Passenger Ship Terminal and its extensive consideration by the responsible local public officials, including those who presided at and participated in three public hearings, it is respectfully submitted that no additional hearing by this Commission is required at this time.

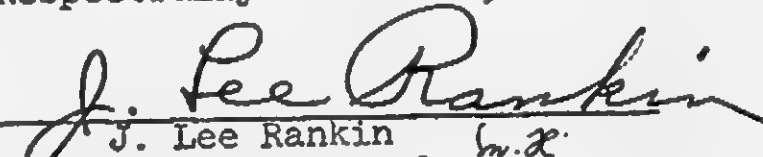
It is emphasized that no Carrier has filed any protest with your Commission.

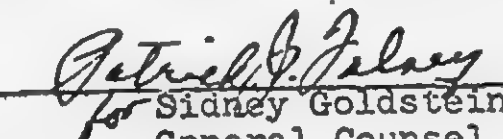
An evidentiary hearing on protestant's factual assertions concerning the relative merits of protestant's potential and vaguely described proposal and the thoroughly developed project agreed upon by the City, the Port Authority and the steamship lines, both involving basically the same property, is beyond the scope of any violations alleged in the protest. It would relate entirely to the propriety of the City's recent rejection of protestant's proposal, and acceptance of the joint plan of the City and the Port Authority. Protestant has not justified an evidentiary hearing on any significant or material fact necessary to the Commission's determination under Section 15 -- a hearing would only result in critical delay of an urgently needed terminal facility.

The burden of protestant's other allegations is that the agreements, on their face, contravene antitrust policy and are, therefore, presumptively contrary to the public interest under Section 15. The special transportation conditions compelling the agreements at issue have been described above and in Attachments "A" and "B". The existence of these conditions completely dispel any presumption of illegality. Approval of these agreements would result in clear and positive benefit to the public interest and to the commerce of the United States in positive furtherance of the objectives of the Shipping Act.

For the foregoing reasons, it is urged that the protest is wholly lacking in merit with respect to matters within the jurisdiction of your Commission.

Respectfully submitted,

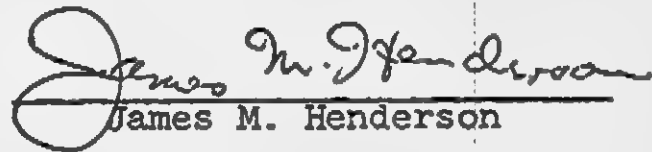

J. Lee Rankin *lm.R.*
Corporation Counsel
The City of New York


for Sidney Goldstein
General Counsel
The Port of New York Authority

New York, New York
March 18, 1969

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Answer To Protest upon Counsel to the Protestant by hand delivering a copy thereof to his office at 1028 Connecticut Avenue, N.W., Washington, D.C. 20036.


James M. Henderson

Washington, D.C.
March 18, 1969

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FEDERAL MARITIME COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL MARITIME COMMISSION
IN THE MATTER OF
AGREEMENTS NO. T-2271, T-2272

SUPPLEMENTARY RESPONSE OF THE PORT OF NEW YORK AUTHORITY

The Port of New York Authority, to supplement its answer to the protest of Marine Space Enclosures, Inc., says:

By telegram dated March 18, 1969, the attorney for the Protestant accused The Port of New York Authority of endeavoring to compel passenger lines to execute Agreement T-2272. The telegram cites an alleged threat of "delays or inconveniences." It proceeds to assert that the alleged conduct violates Section 15 of the Shipping Act.

The undersigned has telegraphed his opinion to the Commission that there can be no violation of Section 15 of the Shipping Act by the present or prospective parties to the agreement because the agreement specifically provides that it shall be "null, void and of no effect unless and until the same shall have been approved by the Federal Maritime Commission, as may be required by law." (Paragraph 8)

The Port Authority now respectfully submits, in addition, that on the facts there has been no compulsion exercised by the Port Authority on the Carriers either to execute the agreement or to impose delays or inconveniences on those not wishing to utilize the terminal.

The Protestant's telegram in quoting the terms "delays and inconveniences", draws on a portion of a letter

transmitted by Mr. A. L. King, Director of Marine Terminals on February 20, 1969 to all passenger steamship lines who have indicated a desire to utilize the terminal but who had not as of February 20, 1969 executed the Carrier Agreement. A complete copy of Mr. King's letter is attached as Exhibit 1.

Mr. King's letter notes that it was then hoped that March 16, 1969 would be the date when the Port Authority's Interim Terminal operation commenced. Inasmuch as all of the addressees had received agreements, they were, of course, aware that the Interim Terminal operation could be commenced only pursuant to those agreements and that those agreements could not take effect unless and until they are approved by the Federal Maritime Commission. Mr. King's letter then reiterated what is expressed clearly in the agreements, that all Carriers desiring to utilize the Interim and Permanent Terminals must do so on the uniform terms and conditions stated in the agreement. He carefully noted that all agreements executed by the Carriers must be filed with the Maritime Commission and receive any necessary approvals.

His letter concludes with the request that the Carriers "kindly give attention as a priority matter to the execution of the agreement," noting the obvious fact that a Carrier wishing to utilize the Permanent Terminal who had failed to execute the agreement, would present an administrative problem for the Port Authority in light of its commitments

to persons who had signed the agreement that the terms and conditions of berthing at the Interim and Permanent Terminals would be identical for all users.

We respectfully submit that such a communication cannot be equated with compulsion.

Whatever doubt might nevertheless persist as to the matter of alleged compulsion, is completely dispelled, we believe, by subsequent events. Certain Carriers on receipt of the February 20 letter, dispatched a telegram to the Port Authority requesting deferment of the March 16 date for initiation of the project on the ground that they wished to discuss operating and financial matters with their principals who would be convened at Lisbon on March 10 at a meeting of the Atlantic Passenger Steamship Conference. The Deputy Executive Director of the Port Authority responded by telegram, a copy of which is attached hereto as Exhibit 2, in which he stated that the Port Authority would "withhold initiation of the project for three weeks beyond the March 10, 1969 Lisbon meeting." This telegram was dated March 1, 1969.

On March 11 and March 12, 1969, the Port Authority received executed copies of the agreement from the Norwegian-American Line and the Swedish-American Line. These agreements will be filed with the Federal Maritime Commission to supplement the filing of the copies previously executed by the Port Authority and the City of New York, United States Line, the Cunard Line and the French Line.

In addition, we have received a communication from the Managing Director of the Italian Line to the effect that Italian Line wishes to continue discussion of a design problem as to the length of the inner berths at the Permanent Terminal before it will execute the agreement. The Italian Line communication continues to stress its support of the project.

The Italian Line communication, copy of which is attached, amply demonstrates the inability of the Port Authority to impose requirements on the Carriers.

The agreements filed with the Commission point to the same conclusion. Agreement T-2271 expressly provides that the Interim Terminal operation cannot be commenced unless and until the present lessees of Piers 40, 84, 88 and 92 (Holland-America Line, American Export Isbrandtsen Line, French Line and Cunard Line) execute agreements of surrender of their leases to the City. (Paragraph 31e - p. 25) Thus, unless the present lease carriers surrender their leases to the City, the leasing of these piers for the Interim operation by the Port Authority cannot become effective. The Cunard and the French Lines have executed the Carrier Agreement but the Holland-America Line has not and none of these lines has executed a surrender of its lease. Accordingly, both the Port Authority and the City are powerless to proceed without the voluntary cooperation of all of these Carriers. That cooperation will

be evidenced by the deliberate choice on the part of these Carriers that they desire a new consolidated passenger ship terminal.

As to the Carriers who are not now lessees of City-owned piers, there is available to them the option of seeking berths at locations other than those owned or controlled by the Port Authority or the City of New York within New York Harbor. These include privately-owned waterfront on the North River, Brooklyn, Staten Island, and municipal and private property in Jersey City, Hoboken and other locations in New Jersey. The surrender of their leases by the present lessee-carriers to the City for future operation of those piers by the Port Authority does not, therefore, confront the non-lessee carriers with the sole alternative of dealing exclusively with the Port Authority for future berths in New York Harbor.

Their choice to use or not to use the present passenger ship piers on the North River will be determined, it is submitted, by their decision as to which course of action best serves the interests of their company and the industry. It is to be noted that the Norwegian Line and the Swedish-American Line which have executed Agreement T-2272, are in the non-lessee category at present.

The matter of requiring uniform treatment of all users of the Terminal and the concept that the Terminal must consolidate all of the passenger vessel operations in the

Port of New York have been basic to the studies and discussions participated in by the Carriers, the City and the Port Authority over the past three years. As early as August 1, 1966, the Shipping Digest, in an article describing the study of the Consolidated Passenger Ship Terminal, reported that Austin J. Tobin, Executive Director of the Port Authority, in a letter to Mayor Lindsay, dated July 14, 1966 had stated:

"For a consolidated terminal to function effectively, it must be used by all ships whose primary purpose is to carry passengers to and from New York."

On October 18, 1966, the Trans-Atlantic Passenger Steamship Conference issued a release as to the results of its annual meeting which had been held in Venice. The release stated:

"The Conference expressed great interest in the studies being pursued in New York at this time towards developing a new consolidated steamship passenger terminal. Keenly aware of the desirability of improving the pier reception facilities for visitors and returning residents, the hope was expressed that the current review would soon result in a definite recommendation."

On April 25, 1967, the Port Authority recommended to Mayor John V. Lindsay, a plan for improved passenger ship facilities. The report is Exhibit A to our submission to the Commission on March 18, 1969. The report reflected consultations with the passenger steamship lines which serve the Port of New York. It presented as the basic criterion, the need to provide new and improved facilities, adequate to handle all

This public report thus made clear that to the extent that it was within their power to do so, the Port Authority and the City planned and desired to centralize all passenger ship operations at the new facility.

The Port Authority and the City were then invited to attend a Trans-Atlantic Passenger Steamship Conference in Copenhagen on October 10 and 11, 1968. The proposed Carrier Agreement containing terms and conditions similar to T-2722 was distributed to each Carrier in advance of the meeting.

After two days of discussion at Copenhagen, the participating lines approved a joint statement:

"The member lines of the Atlantic Passenger Steamship Conference, as a group, have reaffirmed their general approval of the New York passenger pier proposal.

"The representatives of the City of New York, the Port of New York Authority, and the members of the Conference agreed to work together and to meet and solve the operating and economic problems which will face them in the realization of the project."

Intensive negotiations were then held with a committee of the Carriers as to all the details of the project and proposed agreements.

As a result of these discussions, on November 6, 1968, Mr. A. Lyle King, Director of Marine Terminals for the Port Authority, transmitted a revised agreement which included specific improvements requested by the Carrier committee. These reduced the costs to the Carriers by stretching the amortization

of the present and future passenger ship movements in the Port of New York. It stated that, notwithstanding that it would not be feasible to continue the practice of leasing piers on a long-term contractual basis, the Port Authority believed it could be financed, constructed and operated on the required self-supporting basis. The method for achieving self-support was stated to be a tariff of dockage and wharfage charges applicable uniformly to all passenger ship movements.

The plan was discussed with the Carriers at 1967 Conference meetings in Bermuda and London. And throughout the summer of 1968, a series of conferences with the principal United States representatives of all the Carriers was held, at which the City and the Port Authority detailed the proposed operating and financial plans.

In September, 1968, the Port Authority prepared a supplementary report (Exhibit B to our submission of March 18, 1969). It reported that its continuing studies led to the conclusion that the project could be considerably simplified thereby reducing costs and improving the economics of the project. The report expressly stated:

"As in the original proposal, it is assumed that the present practice of leasing piers on a long-term basis will be discontinued in favor of a system under which the ship lines will pay for the use of the terminal on a ship-by-ship basis according to an established tariff of dockage and wharfage charges. The City, the Port Authority and the ship lines would agree that any vessel in the passenger service calling at New York would be required to use the consolidated terminal."

period from fifteen to twenty years, or reducing annual carrying charges by approximately \$620,000. The revisions requested by the Carriers included the addition of the most favored nations clause. This clause, of course, formalizes the principle that all users of the Terminal will be treated equally.

Simultaneously, the City and the Port Authority had been negotiating the terms and conditions of the lease between themselves governing the financing, construction and operation of the Consolidated Passenger Ship Terminal. (Agreement No. T-2271) A key provision of that agreement is Section 31 entitled "Consolidated Operations", under which neither the Port Authority nor the City may enter into any agreement with owners or operators of passenger vessels authorizing the use of other Port Authority or other City property for any operations in connection with passenger vessels. It also provides that the City and the Port Authority will not authorize others to construct any passenger vessel terminal facilities.

The mutual covenant not to compete extends for the period within which it is estimated that the new terminal will remain of utility to the Port and its users. With appropriate rehabilitation work being done, this period can extend for seventy years. However, neither the Port Authority, the City, nor the Carriers will be bound by this covenant if the terminal is permitted to become unsafe, unsound or of inadequate capacity.

Similarly, under the Carrier Agreement, if the terminal operator, whether it be the Port Authority or the City, in the future fails to adapt the terminal as required to meet industry-wide technological changes, the covenant does not bind.

The agreement by the Port Authority and the City to forbear from activities competitive with the Consolidated Passenger Ship Terminal follows two earlier public precedents. The first was the 1947 agreement between the City and the Port Authority, under which the Port Authority assumed responsibility for the development and operation of John F. Kennedy International and LaGuardia Airports. Section 10 of that agreement provides that neither the City nor the Port Authority will, itself, construct or operate airports competitive with LaGuardia and John F. Kennedy International Airports. It also provides that neither would authorize others to construct and operate competitive airports. The covenant continues for the term of the lease which will not expire until the year 2016.

In 1950, the Port Authority opened the Port Authority Bus Terminal which consolidates at a single westside site, all of the long-haul and commuter bus terminal operations in New York City. This facility was made possible in part through the adoption by the Board of Estimate of a resolution declaring that the City would not authorize construction or operation of any new bus terminals closer to midtown than the Port Authority Bus Terminal. This policy fortified the determination of the Port Authority and the City that intercity

bus operations and their terminals shall be confined to the peripheral areas of Manhattan.

To the best of our knowledge, every interstate long-haul carrier and every New York-New Jersey commuter carrier serving midtown New York City is a tenant at the Bus Terminal at present. Their agreements with the Port Authority specifically commit these carriers to use the Bus Terminal for all regular route operations to and from central Manhattan.

Such commitments from the users, just as is the case with the consolidated ship terminal, are the essence of the ability of the responsible public agency to provide consolidated or union terminal operations.

It is obvious that the Carriers understand the essentiality of the requirement that to the extent that the parties can do so, they will commit their efforts and activities solely to the public consolidated ship terminal. None of the Carriers have protested this requirement or any other provision of the agreements.

They have not done so before this Commission, nor have they done so at any of the three public hearings held in connection with the project in the City of New York. On the contrary, at the Board of Estimate hearing held on November 21, 1968, representatives of the American Export Isbrandtsen Lines, the Cunard Line, United States Lines, the Italian Line, North German Lloyd Line and French Line appeared in support of the

project. Before the Board of Estimate on that date, were four resolutions authorizing the City to enter into agreements 2271 and 2272. The Public Calendar for that Board of Estimate meeting described the agreements in detail. Thus, the Calendar states that one of the resolutions before the Board authorized "the Commissioner of Ports and Terminals to execute a companion agreement restricting passenger vessel operations to the proposed terminal."

At none of the three public hearings held by the City agencies was there any opposition expressed to the terminal, as such. Representatives of the International Longshoremen's Association expressly supported the passenger ship terminal, noting as well, that the City should similarly act to provide cargo-handling facilities on the North River.

The then Assistant Secretary of Transportation, Mr. Donald G. Agger, and the Regional Commissioner of Customs, Mr. Michael Stramielo, appeared in support of the project at the Board of Estimate hearing.

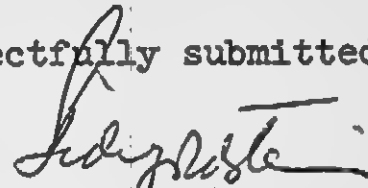
Cunard and the American Export Isbrandtsen Lines also supported the passenger ship terminal project at a public hearing held by the New York City Council in December of 1968.

At the City Council hearings, a key issue was whether the project should be delayed pending a study of the Protestant's alternate plan. The City Council voted unanimously to approve the passenger ship terminal project for immediate initiation, having been advised by the Chairman of the City Planning Commission and the Port Authority that the period required for study of the alternate plan would be so protracted that it was unlikely that either plan could ever become a reality. It was stressed to the City Council that construction costs are escalating rapidly and that the cost of municipal finance is also increasing. A delay of any significant period would inevitably add significantly to the presently estimated \$60,500,000 cost of the new terminal.

These same factors should be weighed by this Commission in determining whether or not to hold a hearing before permitting the initiation of this project. The Commission should also take into consideration the fact that local labor representatives have made preparations for the necessary manpower shifts which will occur when the Interim Terminal operation commences. Labor is ready to implement this plan promptly. A delay of as much as a month could disrupt these delicate and important arrangements.

It is respectfully submitted that the public interest urgently requires prompt favorable action by your honorable Commission on the pending agreements. The lack of any protest by a party with a genuine interest in the industry and the history of industry and public support for this project warrants speedy rejection of the protest.

Respectfully submitted,

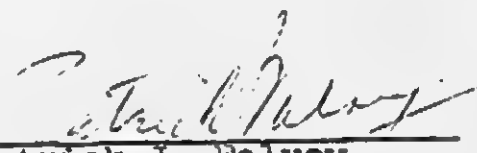


Sidney Goldstein
General Counsel
The Port of New York Authority

Dated: March 21, 1969

CERTIFICATE OF SERVICE

I hereby certify that I have this day served
the foregoing Supplemental Answer to Protest upon Counsel
to the Protestant by mailing a copy thereof to his office
at 1028 Connecticut Avenue, N.W., Washington, D. C.
20036.


Patrick J. Falvey

New York, New York
March 21, 1969

THE PORT OF NEW YORK AUTHORITY
111 Eighth Avenue at 15th Street, New York, N.Y. 10011

Marine Terminals Department

February 20, 1969

A. Lyle King, Director Telephone 620-7412

To: All passenger steamship lines who have received agreements, except
Cunard Line, U. S. Lines, French Line

On February 20 the Port Authority filed with the U. S. Maritime Commission in Washington, Carrier Agreements executed by French Line, Cunard Line and U. S. Lines, and by The Port of New York Authority and the City of New York. We forwarded copies of this agreement to you on February 6 with a letter asking your company to execute the "Counterpart Execution Copy" and return it to me for filing. As of this writing we have not received the agreement from you.

March 16 at 12:01 a.m. has been designated as the target date for the termination of agreements now existing with the City of New York and various carriers in connection with Piers 40, 84, 86, 88, 90, 92 and 97. All ships requiring berthing space on any of these piers on and after March 16 must apply to the Port Authority for such space. The filing of an executed agreement with us, the subsequent filing by us with the Maritime Commission and any further approval then required by the Commission is necessary before a berth can be assigned. Will you kindly therefore give your attention as a priority matter to the execution of the agreement in order that you will not encounter any delays or inconveniences in docking your vessels when they arrive in New York on or after March 16.

For your further information, it is anticipated that Piers 86 and 88 will be vacated by March 16 and that berths will be provided by the Port Authority at Piers 40, 84, 90, 92 and 97.

Yours very truly,

A. Lyle King, Director
Marine Terminals

cc: Hon. William F. Tobin
Department of Ports & Terminals
City of New York

— Exhibit 1

TELEGRAM

MARCH 1, 1969

YOUR TELEGRAM OF FEBRUARY 26, 1969 IS MOST DISAPPOINTING BOTH TO THE PORT AUTHORITY AND THE CITY OF NEW YORK AND THEIR EFFORT TO PROVIDE A MODERN AND EFFICIENT PASSENGER SHIP TERMINAL FOR THE COMFORT AND CONVENIENCE OF YOUR PASSENGERS.

YOUR ADVICE THAT INITIATING THE PROJECT ON MARCH 16, 1969 IS "UNACCEPTABLE" COMES OVER FOUR MONTHS AFTER THE ATLANTIC PASSENGER STEAMSHIP CONFERENCE AT COPENHAGEN APPROVED THE PROJECT IN PRINCIPLE. DURING THOSE FOUR MONTHS, MANY MEETINGS HAVE BEEN HELD WITH THE LINES' LOCAL REPRESENTATIVES AND THEIR COUNSEL. SUBSTANTIAL CONCESSIONS AS TO FINANCIAL MATTERS HAVE BEEN MADE BY THE CITY AND THE PORT AUTHORITY AS A RESULT OF THESE MEETINGS, DESPITE THE FACT THAT FROM THE INCEPTION OF OUR DISCUSSIONS, IT HAS BEEN CLEAR THAT THE ENTIRE RISK OF LOSS IS ON THE PORT AUTHORITY IF THE INDUSTRY IS UNABLE TO KEEP THE EXISTING VOLUMES OF ITS TRAFFIC IN NEW YORK.

THE PRESENT AGREEMENTS WERE THEN APPROVED BY THE BOARD OF ESTIMATE, THE CITY COUNCIL AND THE PORT AUTHORITY BOARD AFTER THREE PUBLIC HEARINGS. NO OPPOSITION TO THE AGREEMENTS WAS EXPRESSED BY YOU AT ANY OF THESE HEARINGS.

NO OTHER FINANCIAL MATTERS CAN NOW BE CONSIDERED BY THE PORT AUTHORITY OR THE CITY. THE ONLY POSSIBLE EXCEPTION WOULD BE

(more)

A REQUEST BY A MAJORITY OF THE LINES TO REALLOCATE AMONGST THEM THE TOTAL COSTS WHICH MUST BE IMPOSED TO SUPPORT THE TERMINAL. BECAUSE A PUBLIC TARIFF FOR THE NEW TERMINAL MUST BE PROMULGATED TO COVER THESE COSTS, ANY SUCH REALLOCATION MUST BE BASED ON RATIONAL AND NON-DISCRIMINATORY STANDARDS.

WE ARE AWARE OF NO MAJOR OPERATING PROBLEMS WITH RESPECT TO THE PLAN AND HAVE BEEN RECEIVING YOUR COMMENTS ON DESIGN AND CONSTRUCTION. WE WILL CONTINUE TO DISCUSS OPERATING DETAILS AND THE CONSTRUCTION PLANS AS THE PROJECT PROCEEDS.

WHILE THE FOREGOING REVEALS THAT, FOR THE LINES WHO SINCERELY DESIRE TO REPLACE THE EXISTING DECREPIT AND UNCOMFORTABLE PIERS, THERE SHOULD NOW BE NO SUBSTANTIVE PROBLEMS WARRANTING THE ATTENTION OF PRINCIPALS, NEVERTHELESS, IN DEFERENCE TO YOUR PRINCIPALS, WE WILL WITHHOLD INITIATION OF THE PROJECT FOR THREE WEEKS BEYOND THE MARCH 10, 1969 LISBON MEETING OF THE ATLANTIC PASSENGER STEAMSHIP CONFERENCE. THE INTERIM TERMINAL PERIOD WILL THEREFORE COMMENCE AT 12:01 AM APRIL 1, 1969.

IN THE MEANTIME, WE ARE ASKING OUR BOARD TO PROMULGATE THE TARIFF FOR THE INTERIM PERIOD AND TO AUTHORIZE AWARD OF THE CONTRACTS FOR DEMOLITION.

THE FOLLOWING ARE RECEIVING THIS TELEGRAM: SWEDISH AMERICAN LINE, GREEK LINE, MOORE-MCCORMACK LINES, UNIVERSAL CRUISE LINE, INCRES LINE, HOME LINE, CHANDRIS LINES, CANADIAN PACIFIC, NORTH GERMINAL LINES, NORWEGIAN AMERICA LINE, ITALIAN LINE.

(more)

THE FOLLOWING ARE RECEIVING COPIES OF THESE TELEGRAM
FOR INFORMATION ONLY: AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
CUNARD LINE, LTD., GERMAN ATLANTIC LINE, FRENCH LINE, UNITED
STATES LINES, COGEDAR LINE, HOLLAND-AMERICA LINE.

MATTHIAS E. LUKENS
DEPUTY EXECUTIVE DIRECTOR
THE PORT OF NEW YORK AUTHORITY
111 EIGHTH AVENUE
NEW YORK, NEW YORK - 10011

(end)

1733

MA ~~DELIVERY LINE~~

ITALY IS THE COUNTRY OF REGISTRY
OF ALL ITALIAN LINE VESSELS

"ITALIA" SOCIETA' PER AZIONI DI NAVIGAZIONE-GENOVA
ONE WHITEHALL STREET • NEW YORK, N. Y. 10004

IN REPLY PLEASE REFER TO:

SEGRETERIA G. M.

March 20, 1969

Mr. Matthias E. Lukens
Deputy Executive Director
The Port of New York Authority
111 Eighth Avenue
New York, N. Y. 10011

Dear Mr. Lukens:

On behalf of Italian Line, I have delayed replying to your telegram dated March 1, 1969 until after the Lisbon meeting referred to in the joint telegram from carriers dated February 26, 1969 and until I have had subsequent discussions with Italian Line, Genoa.

Ever since the Atlantic Passenger Steamship Conference in Copenhagen, Denmark in October of 1968, Italian Line has approved in principle the project for the proposed consolidated passenger ship terminal in New York City. Italian Line was the first major steamship line to hold a conference with the Port Authority for the purpose of resolving outstanding operating problems.

When the Port Authority requested Italian Line to appear before the Board of Estimate of the City of New York in November of 1968, Italian Line did so and stated:

"The Italian Line joins with other steamship companies and all those interested in better travel conditions in endorsing the principle of a modern, attractive, functional passenger facility for the world's greatest port. As a result, we have been pleased to participate in discussions and negotiations with the City of New York and the Port Authority for the purpose of trying to bring about the realization of the new consolidated Passenger Terminal and, at the same time, resolve certain operating and economic questions and problems which face the Italian Line in connection with it."

MIDTOWN SALES AND INFORMATION OFFICE: 676 FIFTH AVENUE, NEW YORK, N. Y. TELEPHONE: 792-5287

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Furthermore, Italian Line has taken the position that until its deferred maintenance obligation with the City of New York is resolved, it cannot execute agreements with the Port Authority covering either interim or future use of the permanent terminal. As of today, it seems likely that, as a result of Italian Line's consistent efforts, the deferred maintenance problem with the City of New York may be resolved.

It should also be noted that Italian Line was not given any effective opportunity to analyze in depth, comment on or make changes in the basic agreement between the City of New York and the Port Authority until that document was in such form that it could not be changed. Italian Line's views with respect to deferred maintenance reserves, contingency reserves and other substantial financial matters were never considered by the City or the Port Authority.

Furthermore because the consolidated pier facility will be operated on a user tariff basis, the entire cost of constructing, financing and operating the proposed facility will be borne by those carriers and their passengers who utilize the consolidated facility. Should the volume of use decrease, the charges which the Port Authority can levy upon the users would increase until a maximum ceiling on such charges is reached. Therefore, Italian Line, as a proposed major user, has a strong economic interest not only in the charges assessed against it and its passengers but also in the number of other carriers who will utilize this facility in the future.

We are not aware of any discussions with the Port Authority during 1969 with respect to a reallocation of total costs among the carriers who are expected to utilize the new facility. I would appreciate detailed information in this regard.

Your telegram indicates that you are not aware of any major operating problems in connection with the presently proposed plan. For several months, Italian Line has raised with the Port Authority a serious design problem with respect to the length of the middle finger pier and the inner berths of the other two finger piers. Although the Port Authority has attempted to redesign this middle finger pier and the inner berths of the other two finger piers, Italian Line is still of the opinion that berths of less than 1,000 ft. are impractical and may be unsafe in view of our present knowledge of ships which will require a berth length

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of at least 1,000 ft. The S.S. Michelangelo, the S.S. Raffaello of Italian Line as well as the S.S. United States, the S.S. France and the Queen Elizabeth 2 are presently known to fall in this category. In addition, the present design of the three finger piers provides for apron widths which are so great that serious docking problems may be caused especially when all berths are in use.

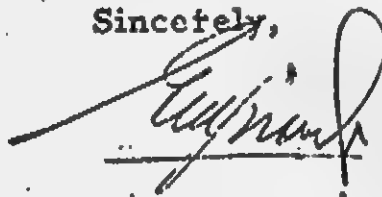
Italian Line has supplied the Port Authority with its detailed "Freight Requirements" at the proposed permanent facility. Only recently has Italian Line received a satisfactory response from the Port Authority with respect to a majority of its freight requirements.

A further question remains as to whether Italian Line will have an opportunity during the interim construction period to act as agent for the operation of Pier 90 on an economically sound basis.

Whether or not the problems mentioned here can be resolved on or before April 1, 1969 is a matter for which the City of New York and the Port Authority must bear prime responsibility at this time.

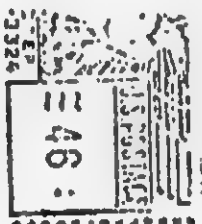
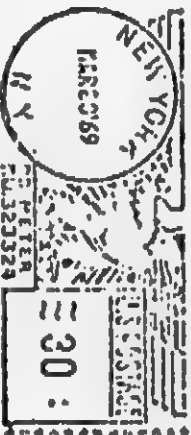
Italian Line sincerely desires to use a new and improved passenger facility in New York City. However, that facility must be available with, at the very least, the efficiency of the present operation at Pier 90 and be on a sound economic basis for Italian Line.

Sincerely,



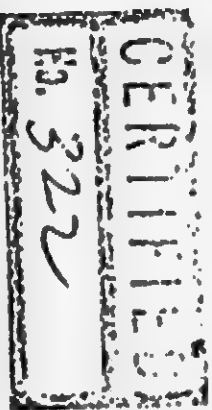
Ottone Empoldi
General Manager U.S. and Canada

ITALIAN LINE
 The Sunny Southern Route
 to the Mediterranean
 and all Europe



SPECIAL DELIVERY

Mr. Matthias E. Lukens
 Deputy Executive Director
 The Port of New York Authority
 111 Eighth Avenue
 New York, N.Y. 10011



RETURN RECEIPT REQUESTED

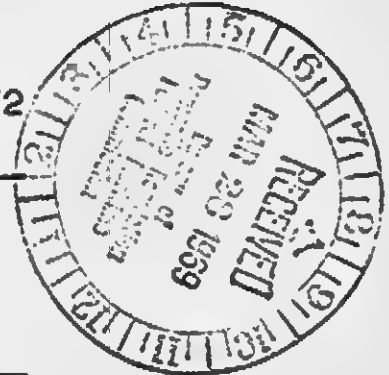
SPECIAL DELIVERY

43

BEFORE THE
FEDERAL MARITIME COMMISSION

In the Matter of
FMC Agreements Nos. T-2271, T-2272

REPLY TO SUPPLEMENTARY RESPONSE
OF PORT OF NEW YORK AUTHORITY



Since the Supplementary Response of the Port of New York Authority dated March 21, 1969 (copy of which was never received by this office but was furnished by the Commission's courtesy), which commences as a reply to Protestant's telegram of March 18, 1969, is in reality a further extensive defense of Agreements T-2271, T-2272, Protestant presumes that it may be heard in rebuttal.

1. Whether the Authority's letter of February 20, 1969, addressed to all passenger lines, represented an attempt to compel the lines to execute T-2272 can be gathered from its terms and from the subsequent events, for an account of which we are indebted to the Supplementary Response:

(a) The letter of February 20, 1969 announced a "target date" for termination of existing leases, and explicitly said: "All ships requiring berthing space on any of these piers on and after March 16 must apply to the Port Authority for such

space. The filing of an executed agreement with us, the subsequent filing by us with the Maritime Commission and any further approval then required by the Commission is necessary before a berth can be assigned. Will you kindly therefore give your attention as a priority matter to the execution of the agreement in order that you will not encounter any delays or inconveniences in docking your vessels when they arrive in New York on or after March 16." The letter concluded with advice that two major piers would be closed by March 16, so that berths would be available only at the five other interim piers.

We cannot read this document as an awkwardly worded adjuration to expedite execution because the project would otherwise be delayed pending Commission approval. Instead, it fairly laid down that after March 16 the Port Authority would be assigning pier space, and would do so only to signatory lines, and perhaps also only after Commission approval "if necessary." To close down certain piers, to cancel leases on the others, and to condition berth assignments for the interim terminal on execution of the agreement would clearly be to carry out paragraphs 1(b), 4 C, 31(a) [second sentence], (c), (d), (e) of T-2271 before Commission approval, notwithstanding the express terms of paragraph 36; and likewise as to paragraphs 3 [first two sentences], 4, 5(a), and 9 of T-2272. We submit that this is exactly what the letter of February 20 said would happen.

(b) It appears that the response from the lines was "most disappointing". So said a bitter telegram addressed to them by

the Port Authority on March 1, 1969 [Exhibit 2 to Supplementary Response], from which much interesting information can be gathered. So far as relevant to the present issue, however, in grudgingly agreeing to permit consultation of the lines with their principals, the Port Authority has repeated its intention to go ahead with the project entirely without reference to §15. "... in deference to your principals, we will withhold initiation of the project for three weeks beyond the March 10, 1969 Lisbon meeting of the Atlantic Passenger Steamship Conference. The interim terminal period will therefore commence at 12:01 A.M. April 1, 1969. In the meantime, we are asking our Board to promulgate the tariff for the interim period and to authorize award of the contracts for demolition."

To the Port Authority, its "deference" may seem a sign of negotiating weakness. To us, it reads like a definite ukase intended to take effect at a minute certain. This it may not do.

(c) What has emerged from the new submission and its appendices is that as of the time the agreements were filed only three lines had executed T-2272, though signature spaces were shown for eighteen, all the existing passenger lines (including some known to have suspended operations). We suggest that this was a misrepresentation to the Commission. Surely it is inappropriate, to say no more, to imply that parties have contracted by a form of document which shows their names listed in an imposing sequence more than three pages long. Protestant was actually misled on this score, having supposed, perfectly naturally, that all parties shown must have agreed, and that only a

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ministerial act of execution, delayed for some reason, remained to be performed. Now it seems that serious disagreements remain, and that even the physical attributes of the new terminal are in dispute. See Exhibit 3 to Supplementary Response, letter of Italian Line. What the City and the Port Authority have done, quite simply, is to imply they have final agreements with companies with which in fact they are merely negotiating.

We can scarcely understand such a procedure. It is common for conferences to provide that other unnamed persons may adhere to an agreement by complying with stated admission requirements. But it is unexampled to give a long list of companies which have not signed in a form that plainly implies that they have.

At the very least, the agreements are not ripe for approval before they are signed. We shall argue further that this is all the more the case when their proponents seem to be contending that they cannot be effective without exclusive patronage of all the lines. And it would still be true even if the Port Authority were so confident of compelling adherence by April 1 that it was prepared to break ground without it.

2. Both in its original and supplementary responses the Port Authority has made representations concerning the meaning of the two agreements which cannot be sustained from their text. For instance, the first response said: "There is nothing in the agreement to prevent a public or private developer from constructing a new passenger ship terminal on property not now under

the control of the Port Authority or the City of New York. Accordingly, any carrier not wishing to sign the agreement ... is presently free to seek out accommodations at other locations in the harbor not affected by the ... agreements." [10] The Supplementary Response specifies these locations as "privately-owned waterfront on the North River, Brooklyn, S.I., and municipal and private property ... in New Jersey." [5]

(a) To begin with, no carrier which executes T-2272 has any choice whatever. It agrees "to operate all ... passenger service to and from the Port of New York ... only to and from the Interim Terminal ... and ... to and from the Permanent Terminal only *** Moreover, ... [it] shall not make use of any pier, dock, wharf, bulkhead or other terminal of any type within the Port of New York for passenger terminal operations". [Par. 3] If it fails to sign, it is excluded from the existing as well as the new facilities. [Par. 9] This is as tight as it can be with respect to signatories.

A grave legal question presents at the threshold, whether persons other than carriers, even if subject to the Shipping Act, may employ an exclusive patronage contract. We contend that since *FMB v. Isbrandtsen Co.*, 356 U.S. 481 (1958) in effect outlawed exclusive patronage contracts even for carriers under §15, the Commission may authorize such a contract only under §14b, which applies solely to carriers in their relation to shippers of cargo. On the express point of law, the present case seems to be of novel impression in respect of a terminal operator,

although the Commission and its examiners have disapproved efforts in this direction on their merits. See cases cited in our Protest.

The issue is sharpened by the exceptionally severe form of contract exacted here. Paragraph 9 of T-2272 provides, as said, that "No operator of passenger vessels shall be permitted to utilize the Interim or Permanent Terminal except as signatories of this agreement." The ordinary exclusive-patronage contract never refuses service to nonsigners, although it demands a higher rate. Here the nonsigner is denied service. We contend that a terminal, like a common carrier, may not lawfully turn away an applicant for service for refusing to bestow all his business there.

But apart from these extremely serious legal questions, which go to the heart of the Shipping Act, how can it be asserted that a competitive terminal can be developed when the carriers whose business is essential to such an enterprise are precluded from patronizing it? The Port Authority says that despite the penalties for not signing, namely, total exclusion from its projected facilities, carriers need not sign, and may therefore be free to patronize others. Practically, of course, the closing down of all terminals now available and the limitation on use of interim facilities to signatories would, if permitted, constrict the class of such independents to the vanishing point; for competitive facilities could not be constructed rapidly enough to serve them immediately, and they are faced

with eviction on April 1, 1969.

(b) Is it true, moreover, that "there is nothing in the agreement to prevent a public or private developer from constructing a new passenger terminal not now under the control of the Port Authority or the City of New York"?

It must be observed that this statement implies an assertion of fact that there are facilities in New York harbor (specified in the Supplementary Response as being in various parts of the City, including along the Hudson River, as well as in New Jersey) which are not within the control of the City or the Authority. We demand proof of this assertion on the factual side, having understood, for instance, that the City owns all but two piers on the Hudson, obviously the most desirable situs.

On the legal side, we call attention (as we did in our Protest) to Paragraph 31 of T-2271: "... neither the City nor the Port Authority will issue any work permit or other construction approval or consent whereby structures suitable for such [passenger] operations may be provided whether by alteration of existing structures, or by new construction, anywhere within the jurisdiction of the City or the Port Authority." Assuming that there is privately-owned property suitable for terminal use within New York, is it seriously asserted that under New York law it may be so developed without work permits or construction approvals from the City? Of that somewhat improbable condition we demand proof. If it cannot be proved, the suggestion

of freedom to construct is without foundation. The Supplementary Response is franker in admitting (p. 9) that the intention is that "the City and the Port Authority will not authorize others to construct any passenger vessel terminal facilities." [Emphasis supplied.]

What conditions may be in New Jersey is not, with great respect, a matter of concern to Protestant. Its plans call for construction in New York, preferably along the Hudson. It has the right to challenge the legality of the clauses that affect it directly. It expects to prove also that the Hudson is essentially the practical area for passenger-terminal development, and not the other areas to which Respondents would relegate it and others.

We remind the Commission that it is this provision of T-2271 which has obviously most worried the City, for it has exacted indemnification from the Port Authority for legal damages it may perpetrate against owners of private property by withholding work permits under §31. When the parties themselves thus signal the legally dubious aspect of their agreements, others who are affected may challenge it before the Commission.

3. The two responses seem to consider that the transportation need justifying approval under §15 is more or less self-evident, so much so that they even suggest that no hearing is required. One page in each of the papers is all that is vouchsafed on this critical subject.

(a) The idea that hearings by the City Board of Estimate or other similar bodies can satisfy §15 is not, we presume, seriously advanced. Congress has not authorized the Commission to delegate its statutory functions to New York or to the Port Authority. It is also obvious, contrary to assertions in the responses, that the questions before these agencies were not Shipping Act questions. No one is asking the Commission to decide who should build what kind of terminal where. The Commission is being asked by the proponents to approve, and by Protestants to disapprove, agreements that must be measured against the standard of their effect on competition and commerce: to say whether these agreements, which contemplate certain facilities to be built by certain parties, offend against §15 by what they provide respecting who shall use the facilities and respecting whether competitive facilities may be constructed. It is precisely the answers that the "responsible local public officials, including those who presided at and participated in three public hearings," gave to these questions which the Commission is called upon by law to review entirely independently on its own record.

(b) The quite casual justifications for approval that are advanced seem to comprehend the following:

First, we are referred to two promotional brochures [Exhibits A, B to first response], with no guide to the material deemed significant. The brochures show very little more than that it is very cold on cold days in winter and very hot on hot

days in summer at existing New York terminals, and that the plan for remedying this unsatisfactory condition has undergone a remarkable shrinkage in scale between the writing of the two documents. We may also notice that according to Exhibit 3 to the Supplementary Response, the plan is considered by the single most important transatlantic carrier to contain so serious a design problem, that the terminal may actually be unsafe for the five great passenger ships of the world, to say nothing of other docking problems arising out of dimensional characteristics. At best, the material suggests that a new terminal, and (subject evidently to some dispute) perhaps the proposed terminal, may be a desirable improvement upon existing facilities. There is no showing of need for clauses on their face utterly destructive of competition by possible competitive terminals and unjustly discriminatory between carriers.

Second, a halfhearted argument is made that delay even for a hearing may entail rising construction and financial costs. This is, of course, pure conjecture at this stage. It is not outside human experience that contract prices can be fixed, for instance. In any case, the Shipping Act does not purport to underwrite the costs of inflation. The damages to commerce that may be inflicted by an unlawful combination can quite easily outweigh the costs of construction even of a desirable new facility. Nor can it be seriously argued that such costs represent a transportation need justifying clauses otherwise violating the antitrust laws: in what meaningful sense can it be said that

exclusive patronage and the stifling of terminal competition must be accorded for 70 years because otherwise construction costs will rise? The Respondents must prove transportation need for such clauses, not that it may cost them time and money to prove it.

Third, it seems to be contended that the clauses are justified because bus and air terminals in New York have employed them. The short answer is that such precedents, about which, of course, we have no information beyond the Supplementary Response, have no standing before the Commission under the Shipping Act. Whether they have value even as analogies cannot be determined without a record in which they are carefully analyzed; and one suspects that most examiners would regard an excursus into their details as painfully enlarging the scope of any proper hearing before the Commission.

Finally, a single sentence in the Supplementary Response (p. 11) says that clauses such as are here assailed "are the essence of the ability of the responsible public agency to provide consolidated or union terminal operations". If this implies that the proposed terminal cannot succeed without exclusive patronage or against competition, it is obvious that, assuming the particular terminal is proved to be a facility essential to commerce, a very heavy burden falls on the Respondents to prove the truth of this proposition. Not only is there no proof of it, but it is not even explicitly asserted; it must be deduced from the ambiguous phrases quoted. In two recent

cases cited in our Protest, where terminals have sought something resembling exclusive patronage, the Commission's examiners have rejected this argument.

CONCLUSION. Respondents have made no case for approval, let alone for approval without hearing on the grave issues their application presents. Their agreement has not been executed by more than a small fraction of the projected signers. There are evidently serious objections to the design itself, which we have no right to suppose will be arbitrarily overridden. No justification for an exemption from the antitrust laws has been advanced that is cognizable under §15. Moreover, there is grave doubt whether the Commission may accord exclusive patronage to noncarriers at all under §15.

The presence of so many serious questions of fact and law in any case requires the Commission to order the statutory hearing.

Respectfully submitted,



Joseph A. Klausner
Attorney for
Marine Space Enclosures, Inc.
1028 Connecticut Avenue, N.W.
Washington, D. C. 20036

March 27, 1969

55

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing first class mail, postage prepaid, a copy to each such party.

Joseph A. Klausner

Joseph A. Klausner

Washington, D C.

March 27, 1969

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BEFORE THE
FEDERAL MARITIME COMMISSION
In the Matter of
FMC Agreements Nos. T-2271, T-2272

RECEIVED
OFFICE OF THE SECRETARY

1969 MAR 21 PM 4 26

RECEIVED

PETITION FOR LEAVE TO INTERVENE

Comes now American Dock Company of Staten Island, New York, and prays leave to intervene in such proceeding as may be ordered on the Protest of Marine Space Enclosures, Inc. against Agreements Nos. FMC T-2271, T-2272.

American Dock Company is a company organized and doing business in the State of New York, and is owner of piers 1 - 5, Staten Island, New York. It is an affiliated company of the Protestant, and desires to associate itself with the position of such Protestant. Its interest is as a terminal which will be precluded from all present or potential passenger business if the Agreements are approved.

Respectfully submitted,

Joseph A. Klausner

Joseph A. Klausner
Attorney for
American Dock Company
1028 Connecticut Avenue, N.W.
Washington, D. C. 20036

March 21, 1969

57

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing first class mail, postage prepaid, a copy to each such party.

Joseph A. Klausner

Joseph A. Klausner

Washington, D C.

March 21, 1969

58

BEFORE THE

RECEIVED

FEDERAL MARITIME COMMISSION 1969 MAR 25 PM 4 32

IN THE MATTER OF

AGREEMENTS NO. T-2271, T-2272

FEDERAL MARITIME
OFFICE OF THE SECRETARY

RESPONSE TO PETITION FOR LEAVE TO INTERVENE

The Port of New York Authority, in answer to the Petition for Leave to Intervene on behalf of American Dock Company of Staten Island in the above-captioned matter, says:

1. The Petition realleges the erroneous conclusion of its affiliate, Marine Space Enclosures, Inc., that approval by this Commission would preclude the Protestant from all present or potential passenger business. None of the provisions of the pending agreements purport to prevent any private property owner from accommodating passenger ship movements on its existing properties. The Port Authority's original response, made jointly with the City of New York, and the Port Authority's supplementary response to the Protest of Marine Space Enclosures, Inc. specifically deny that any such result would flow from the agreements or their approval by this Commission. The erroneous contention was made at page four of the Protest.

The joint response also made clear that the Carriers agreeing to utilize the Consolidated Passenger Ship Terminal

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only for their Port of New York movements, do so voluntarily and in light of what course will best serve their economic interests.

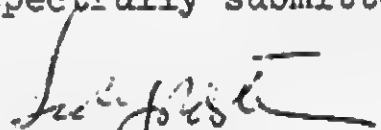
2. It is, therefore, apparent that the Petition for Leave to Intervene sets forth no facts or contentions of substance not previously alleged in the Protest of Marine Space Enclosures, Inc. The Petition for Leave to Intervene should, therefore, be denied, particularly since it is submitted twenty-one days after the Federal Maritime Commission noticed the filing of the agreements for approval and nine days after the time for submission of comments expired.

3. Insofar as the Petition for Leave to Intervene suggests that the Petitioner presently intends to engage in the accommodation of passenger ship vessels in the future, it is contrary to the most recent representation made by Petitioner to the Department of Ports and Terminals of the City of New York. As the attached Affidavit of Honorable Patrick F. Crossman, Commissioner of the Department of Ports and Terminals of the City of New York, establishes, Petitioner and its affiliated company have represented to the Commissioner and his Department, that it has a plan to develop Piers 1 to 5, Staten Island, New York, as a cargo-shipping terminal at which it proposes to handle vessels of carriers which are not now

engaged in the passenger vessel business for which the Consolidated Passenger Ship Terminal will be utilized.

It is submitted that the subject Petition should be denied.

Respectfully submitted,


Sidney Goldstein
General Counsel
The Port of New York Authority

Dated: March 25, 1969
New York, New York

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Response to Petition to Intervene upon counsel to the Petitioner by mailing a copy thereof to his office at 1028 Connecticut Avenue, N.W., Washington, D. C. 20036.

Patrick J. Falvey
Patrick J. Falvey

New York, New York
March 25, 1969

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-----X
the Matter of the
PETITION FOR LEAVE TO INTERVENE

Before the
FEDERAL MARITIME COMMISSION

RE:
FMC AGREEMENTS NO. T-2271, T-2272
-----X

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

PATRICK F. CROSSMAN, being duly sworn, deposes and
says:

1. He is the Commissioner of the Department of
Ports and Terminals of the Economic Development Administration
of the City of New York having responsibility inter alia for
the development and operation of piers and docks of the City of
New York, and for the administration of the Waterfront Plan of
the City of New York which regulates private activities relating
to the conduct of port commerce in the City of New York;

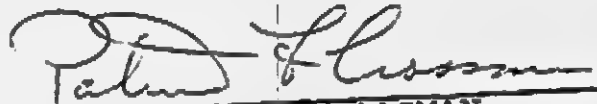
2. In a brochure delivered to your deponent on
March 24, 1969, by Mr. William Zeckendorf, there were included two
letters describing the plans of General Property Corporation,
"Owners of American Dock" for the development of Piers 1 to 5,
Staten Island, New York (known as the American Dock Company
property) and associated property. In a letter dated March 10,
1969 to the publisher of the Staten Island Advance, Mr. Zeckendorf
describes a proposed waterborne cargo-handling facility for this
location designed to "handle a new kind of ocean shipping con-
tainer known as the ^{Lock} Lock System." The waterborne cargo-handling
facility would be provided in combination with housing construction.
Mr. Zeckendorf's letter of February 28, 1969 addressed to your
deponent states that the prospective maritime users of the

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facility are "the Prudential Line, the Grace Line and their accompanying subsidiary lines".

3. He is familiar with Agreement FMC #T-2271 and with the operations of the Prudential Line and the Grace Line, and knows that neither of these carriers conducts the passenger vessel operations ^{in New York} defined in Agreement No. T-2271.

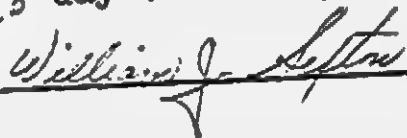
PFE


PATRICK F. CROSSMAN

Dated: New York, New York
March 25, 1969

Sworn to before me this

25th day of March, 1969.



WILLIAM J. SEXTON
Commissioner of Deeds, City of New York 3-119
Certificate filed in New York County
Commission Expires Nov. 26, 1970

PVTL

COPY OF
FEDERAL MARITIME COMMISSION
AGREEMENT NO. T-2271



PASSENGER VESSEL TERMINAL

LEASE:

CITY OF NEW YORK

TO

THE PORT OF NEW YORK AUTHORITY

1968

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THE PORT OF NEW YORK AUTHORITY

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Permanent Premises

Exhibit 1

Precedes index

Interim Premises

Exhibit 2

Precedes index

Schedule of Rental Payments

Exhibit 3

Precedes index

PASSENGER TERMINAL LEASE

AGREEMENT, made this 17th day of January, 1969, by and between THE CITY OF NEW YORK, (hereinafter called "the City") a municipal corporation of the State of New York, with its principal office at the City Hall, in the Borough of Manhattan, City, County and State of New York, acting by its Commissioner of the Department of Ports and Terminals of the Economic Development Administration, and THE PORT OF NEW YORK AUTHORITY, (hereinafter called "the Port Authority") a body corporate and politic, created by Compact between the States of New York and New Jersey with the consent of the Congress of the United States of America, with its office at 111 Eighth Avenue, in the Borough of Manhattan, City, County and State of New York;

WHEREAS, by Chapter Six Hundred Thirty-one of the Laws of New York, 1947, and Chapter Forty-four of the Laws of New Jersey, 1947, as amended and now in force, the said two States have authorized any municipality within the Port of New York District (hereinafter called "the Port District") to cooperate with the Port Authority in the development of marine terminals and, to that end, have empowered any municipality in the Port District to consent to the use by the Port Authority of any marine terminal owned by such municipality or of any real and personal property owned by it, and as an incident to such consent, to grant, convey, lease or otherwise transfer to the Port Authority any such property upon such terms as may be determined by the Port Authority and such municipality; and

WHEREAS, after detailed study and consideration of the problem and project by the Port Authority, the City and the Port Authority have mutually agreed to cooperate in the planning, construction and operation of a modern marine terminal for water-borne passenger travel incorporating facilities for superior comfort, convenience and efficiency, and for serving the objective of consolidating at such terminal the operations of the various passenger lines serving the City and the Port District; and have agreed that effectuation of such a project is and will be in the public interest; and

WHEREAS, the plans for the consolidated passenger ship terminal have been formulated in keeping with the City's comprehensive plan for development of the area east of the terminal's site; and

WHEREAS, the City, by resolution duly adopted by its Board of Estimate on the 21 day of November, 1968 (Cal. No. 9-A), a copy of which is annexed to and made

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A J T

a part of this Agreement, authorized the execution and delivery of this Agreement; and

WHEREAS, by resolution duly adopted by its Board of Commissioners on the 14th day of November, 1968, a copy of which is annexed to and made a part of this Agreement, the Port Authority authorized the execution and delivery of this Agreement;

NOW, THEREFORE, the City and the Port Authority hereby mutually undertake, promise and agree, each for itself and for its successors and assigns, as follows:

1. LETTING

The City hereby demises and leases to the Port Authority, and the Port Authority hereby takes and hires from the City for marine terminal purposes and for purposes consistent or incidental thereto and for no other purpose except with the prior written approval of the said Commissioner:

(a) ALL THOSE CERTAIN pieces and parcels of land, and lands under water, together with the buildings, structures and improvements, if any, thereon or therein, now or hereafter constructed, situate in the Borough of Manhattan, in the City, County and State of New York, bounded and described as lying at or near the foot of West 45th to West 51st Streets, extending from the bulkhead wall 1100 feet more or less to the U.S. Pierhead Line, all as shown in stipple on the print hereto attached, hereby made a part hereof and marked "Exhibit 1"; the foregoing being hereinafter collectively called "the permanent premises". The City will not itself construct or permit any other to construct any structure whatsoever in the following areas covered by water: (i) the area bounded by the southerly line of the permanent premises and a line drawn parallel thereto and one hundred eighty (180) more or less feet to the south thereof, and (ii) the area bounded by the northerly line of the permanent premises and a line drawn parallel thereto and one hundred eighty-seven and one-half (187.5) more or less feet north thereof. Structures existing on the area which constitutes the permanent premises may be used by the Port Authority as hereinafter provided but shall not be considered part of the permanent premises unless physically remaining at the date of final completion of the marine terminal.

(b) All those certain pieces and parcels of lands and lands under water together with the buildings, structures and improvements, if any, therein or thereon, now or hereafter constructed situate in the Borough of Manhattan, in the City, County and State of New York bounded and described as follows:

(1) Pier 40, North River

Located at the Foot of West Houston Street, in the area bounded and described as follows: Beginning at the intersection of the existing bulkhead with a line distant 290 feet southerly from and parallel with the southerly line of Pier 42, North River, thence westwardly parallel with said Pier 42, North River, for a distance of 807 feet more or less; thence southwardly and at right angles to the last mentioned course a distance of 755 feet more or less; thence westwardly parallel with said Pier 42 to the United States Pierhead Line, thence southwardly along said United States Pierhead Line a distance of 55 feet; thence eastwardly parallel with said Pier 42 to the said existing bulkhead; thence northwardly along said bulkhead to the point or place of beginning, all as shown in crosshatch on the print attached hereto, made a part hereof, together with the use of lands under water as shown in stipple on said print.

(ii) Pier 84, North River

Located at the foot of West 44th Street, approximately 1000 ft. long on the north side and 699 ft. long on the south side and 135 ft. wide with the structures thereon, together with the upland area (approximately 25,185 sq. ft.) on the south side of the pier all as shown in stipple on print attached hereto and made a part hereof, together with the use of lands under water as shown in stipple on said print.

(iii) Pier 92, North River

Located at the foot of West 52nd St., approximately 775 ft. long on the north side and 1075 ft. long on the south side and 124 ft. wide with the structures thereon, all as shown outlined in crosshatch on print attached hereto and made a part hereof, together with the use of lands under water as shown in stipple on said print.

(iv) Pier 97, North River

Located at the foot of West 57th St., approximately 700 ft. long and 110 ft. wide with the structures thereon, together with the bulkhead from the center line of slip between Piers 96 and 97, North River, to the center line of slip between Piers 97 and 98, North River, together with the bulkhead sheds approximately 50 ft. in width immediately inshore of said bulkhead and together with 4978 square feet of upland (52 feet in width) inshore of the northerly bulkhead extending to the southerly side of Pier 98 all as shown in crosshatch on print attached hereto and made a part hereof, together with the use of lands under water as shown in stipple on the said print.

All as shown on the print hereto attached, hereby made a part hereof and marked "Exhibit 2", being hereinafter collectively called "the interim premises," and to be used for the activities and operations being conducted there at present.

(c) The permanent premises and the interim premises are hereinafter collectively called "the premises".

2. DEFINITIONS

As used in this Agreement:

(a) "The marine terminal" or "the facility" means the entire development of the permanent premises consisting of land, lands under water and piers, bulkheads, docks, slips, buildings, structures, landscaping and improvements necessary or convenient for the handling, accommodation and servicing of seagoing vessels primarily engaged in passenger service, and the handling, accommodation and servicing of passengers, mail, visitors and cargo, and other activity incidental to such operations.

(b) "Commissioner" or "Commissioner of the Department of Ports and Terminals of the Economic Development Administration" means the officer or agent of the City who for the time being shall be exercising functions the same as or equivalent to those now exercised by the Commissioner of the Department of Ports and Terminals of the Economic Development Administration.

(c) "Passenger vessel" means a seagoing vessel, other than one in military or naval service, engaged primarily in carrying more than three hundred twenty (320) persons as passengers, and loading or unloading not more than one thousand (1,000) long tons of cargo, on voyages extending for not less than twenty-four (24) hours, and actually operated on voyages of at least such duration, from or to the Port of New York, or other vessels, calls of which are recommended by the Port Authority for handling at the marine terminal and approved in writing by the Commissioner.

(d) "Construction cost" and "operating and maintenance costs" are defined in Section 4.

3. TERM AND SURRENDER

(a) The term of the letting of the permanent premises under this Agreement shall commence on a day following the date of completion of construction of the marine terminal, determined as hereinafter provided, and shall expire, unless sooner terminated, on the twentieth anniversary of the date of commencement.

(b) Beginning with the date of commencement of the letting of the interim premises, as hereinafter determined, the Port Authority may enter upon, use and occupy the permanent premises, for the purposes of accommodating interim operations and constructing the marine terminal. All such entry upon, use and occupancy of the permanent premises shall be subject to and in accordance with the provisions of this Agreement. The Marine Terminals Construction Engineer of the Port Authority shall certify to the Commissioner the date of completion of construction of the two southerly finger piers and the associated portion of the headhouse of the marine terminal, and the term of the letting contemplated in paragraph (a) of this Section shall commence on the first day of the calendar month next following such certification, but such commencement date shall in any event occur not later than forty-eight (48) full calendar months after the date of commencement of the letting of the interim premises, unless further postponed by written agreement between the parties. The said Engineer shall also certify the date of completion of the balance of the marine terminal, but unless earlier certified, the same shall be deemed completed in any event on a date not more than twenty-four months after the commencement of the letting of the marine terminal.

(c) The term of the letting under this Agreement as to the interim premises shall commence at 12:01 o'clock A.M. on a day which shall be the day following the latest effective date of surrender of the interim premises, as set forth in one or more agreements to be made between the City and the tenants of the interim premises, but in no event shall the said term commence prior to the day after the Port Authority shall have notified the City in writing that the agency agreements contemplated in Section 31(d) have all been made; and the term of the letting as to the interim premises shall expire on the thirtieth day after the date of the commencement of the term of the letting of the permanent premises under this Agreement, determined as set forth in paragraphs (a) and (b) of this Section, or on such later date as may be approved by the Commissioner on such terms and conditions as he shall determine; provided, however, that the letting of Pier 92 as interim premises shall continue until the thirtieth day after final completion of the marine terminal. The provisions of paragraphs (e), (f) and (g) of this Section shall apply at the appropriate times to the interim premises as well as to the permanent premises, but the provisions of paragraphs (d) and (h) shall have no application to the interim premises or the letting thereof, and the Port Authority shall have no obligation to perform maintenance or repair on the interim premises or any part thereof except as hereinafter specifically set forth.

(d) If the permanent premises or any building, structure or improvement thereon, or any part thereof, at the expiration of the term or its sooner termination, are in need of repair and maintenance (including painting) then the Port Authority shall repair, paint and put the same in good order and condition as determined by the Commissioner in his sole discretion, as though all of such work had been properly done during such term.

(e) On the expiration or sooner termination of the term, the Port Authority will peaceably and quietly leave, give up, surrender and deliver unto the possession of the City without delay the premises, together with all buildings, structures, alterations, additions, changes, replacements and improvements thereon, if any, all of which shall be free and clear of any and all liens, debts or encumbrances of whatsoever kind, nature and description, incurred by the Port Authority or its contractors, and the condition of the permanent premises only, together with the buildings, structures and improvements thereon, shall be as set forth in paragraph (d) of this Section.

(f) Title to all personal property and trade fixtures not part of the original construction, and installed or provided by the Port Authority in or on the premises, is hereby expressly reserved to and in the Port Authority, and the Port Authority shall have the right to remove all of the same upon the expiration or sooner termination of the term, and within thirty (30) days thereafter, provided, however, that the Port Authority shall at its own expense repair any injury to the premises resulting from such removal. Upon written notice from the Commissioner, the Port Authority shall, at its own cost and expense, remove any personal property or fixtures not removed by the Port Authority at the expiration or sooner termination of the term, repairing any injuries to the premises resulting from such removal.

(g) Throughout the term of the letting, except as expressly provided otherwise herein, the Port Authority shall have full and complete control of management and operation of the premises.

(h) Out of the proceeds of bonds to be issued by it and to mature no later than twenty (20) years after the commencement of the term of the letting of the permanent premises, the City shall deposit with a trustee selected by the City and acceptable to the Port Authority the entire construction cost of the marine terminal. The sum shall be deposited and administered as follows:

(i) Not less than sixty days prior to commencement of construction, the Port Authority shall estimate the total cost thereof, and the City shall within fifteen days of such estimate, pay the said sum to the Trustee.

(ii) On a date which shall be thirty days after the delivery by the Port Authority of the estimate required under subdivision (i) above, and on

each of the several following anniversaries of such date during the period of construction, the Port Authority shall deliver to the City an estimate in writing of the total sum required to meet construction costs during the period of twelve months then next following. The City shall thereupon direct the Trustee to place an amount of money equal to such sum, drawn from the fund created under subdivision (1), in an interest-bearing account in the name of the Port Authority and in a depository selected by the City and acceptable to the Port Authority, under terms and conditions permitting the Port Authority to make monthly withdrawals adequate to anticipate and meet required construction cost payments, and permitting extra withdrawals in special circumstances. For each withdrawal, monthly or special, the Port Authority shall submit a statement to the Comptroller of the City of the amount and items of construction cost to be met therefrom.

(iii) Within nine (9) months after completion of construction the Port Authority shall certify to the City the construction cost, now estimated at \$60,250,000 and in the event such cost shall exceed the sum theretofore paid by or on behalf of the City under subdivisions (1) and (ii) above, the City shall pay the deficiency to the Port Authority within sixty (60) days after such certification. If the sum theretofore paid to the Port Authority exceeds the sum so certified, the Port Authority shall pay the excess to the City within thirty (30) days after such certification. Any balance then remaining in the hands of the Trustee shall be payable to the City. The sum so certified shall be subject to audit by the City.

4. RENTAL AND OTHER PAYMENTS

A. Basic Rental for the Permanent Premises:

The Port Authority shall pay to the City for the permanent premises a basic rental annually which shall suffice over the term of the letting of the permanent premises to provide to the City the total of (1) the sum required to amortize

the entire construction cost as certified by the Port Authority and audited by the City, plus (ii) debt service costs (which shall not include payments on account of principal) for the entire period, both as required by the terms of a schedule of debt service requirements hereto attached, hereby made a part hereof, and marked "Exhibit 3." The payment to be made by the Port Authority under this Section for and during the period (not to exceed twenty-four months) from the commencement of the letting of the permanent premises to the final completion of the marine terminal, shall be at a rate two-thirds of that computed in accordance with the foregoing, and such payment shall be, for the basic rental accruing during that period only, full and final payment.

B. Additional Rental for the Permanent Premises:

(a) The Port Authority shall pay the City, as additional rental in each year, the first Seven Hundred Fifty Thousand Dollars (\$750,000) of the excess of actual receipts from all operations at the marine terminal over the sum of the following: (i) all payments currently required to be made under Subsection A and (ii) all operating and maintenance costs as hereinafter defined; and

(b) The balance of the receipts, payable to the City as follows: the sum of Seven Hundred Fifty Thousand Dollars (\$750,000) thereof received in each year and one-half of any such receipts over One Million Five Hundred Thousand Dollars (\$1,500,000) for each year to be held by the Port Authority until the same shall reach a sum which shall be the total of the three highest annual payments made or to be made by the Port Authority as required by Exhibit 3; the other half of such excess, and after accumulation, the entire such yearly balance of receipts, to be paid currently to the City, except that in any event the total amount of the sum withheld for the reserve as above provided and of the sum payable to the City as additional rental under this Subsection B shall not exceed in any year, Two Million Four Hundred Thousand Dollars (\$2,400,000); any surplus of receipts over the sum of (i) that amount, (ii) the annual payments required under Subsection A, and (iii) the operating and maintenance costs, shall be held by the Port Authority for distribution to users of the facility, accomplished by making the surplus a factor towards reduction of tariff charges in subsequent determinations of such charges. The sum reserved shall be available to discharge all deficits (annual and cumulative) in payments of the rental reserved under Subsection A and of the operating and maintenance costs, created by any excess of such payments and costs over receipts; at the expiration of the term any remainder of such reserve and of the reserve for deferred maintenance (with interest, if any is earned), shall be payable as rental to the City.

(c) Payments under Subsection A shall be made quarterly beginning on a date six (6) months after the date of commencement of the letting of the permanent premises. The first such payment shall be for the two previous quarters. Payments

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under Subsection B shall be made annually on April 1 in each year, for the next preceding calendar year, and shall include the net interest, if any, earned on such portion of the receipts as becomes payable. Payments made before costs are finally determined shall be payments on account.

C. Basic Rental for the Interim Premises:

The Port Authority shall pay to the City a basic rental for the interim premises at the annual rate of \$1,821,451.75, payable throughout the term of the letting of the interim premises only, in equal monthly installments in advance, on the first day of each and every calendar month during the said term, with proration on a daily basis for any portion of the term which shall be less than a calendar month, whether at the commencement or at the expiration thereof or both, and provided, that no rental shall accrue hereunder for the period of the letting of the interim premises subsequent to the date of commencement of the letting of the permanent premises except as provided in Section 3(c). Receipts from operations at the interim premises earned from the date of the commencement of the letting of the permanent premises shall be deemed for purposes of this Agreement receipts from operations of the marine terminal.

D. General Rental Provisions:

(a) No breach of any covenant, term or condition of this Agreement other than a breach by the City which prevents or hinders the Port Authority from exercising its rights under this Agreement, shall excuse the Port Authority from the prompt payment of the rentals reserved in this Section 4. The Port Authority shall pay such rentals throughout the term of this Agreement, notwithstanding any provision or clause contained in Section 227 of the Real Property Law of the State of New York.

(b) In the event that the Port Authority, under any law that may hereafter be enacted or applied, shall be or become subject to and liable for payment to the City of any taxes or assessments or other governmental levies or imposts (except charges for water and sewer rental), upon or against the premises or upon any part thereof, then, in addition to other remedies available to it hereunder, the payment by the Port Authority of the amount of such taxes, assessments, levies, or imposts shall, as between the City and the Port Authority, be deemed payment pro tanto of the rent herein reserved under Subsection A or Subsection C as the case may require, and the amount of such payments shall be treated as a cumulative credit against rent otherwise payable under this Agreement if such payments should exceed the amount payable under the said subsections.

(c) "Construction cost" as used in this Agreement shall mean and include all costs in regard to the planning, design and construction of the marine terminal and every part thereof, as such construction is described in the plans to be approved in writing by the Commissioner and to be annexed to this Agreement, and shall include without limitation thereto the following items:

- (1) Payments to or on behalf of contractors;
- (2) Payments for supplies and materials;
- (3) Payments to persons, firms or corporations other than construction contractors for services rendered or rights granted in connection with the construction, including without limitation thereto, payments made in connection with the demolition or removal of buildings or other structures and payments made in connection with the supply, removal, transportation, dumping or disposal of fill, debris or dredged or excavated materials;
- (4) Payments for premiums for performance bonds in regard to construction.
- (5) Payments for premiums for liability and workmen's compensation insurance in regard to demolition and in regard to construction, and in any case in which the Port Authority decides to self-insure any such risk, an amount equal to the premiums which would have been paid for such insurance;
- (6) Payments of premiums for builder's risk and all-risk insurance during construction;
- (7) Payments for purchase of terminal equipment permanently installed and of specialized portable equipment permanently assigned to the marine terminal, and rental payments for equipment used during construction, including any costs of insuring the same;
- (8) Cost to the Port Authority for direct labor and staff actually engaged in the design and construction of the marine terminal;
- (9) Financial costs to the project, if any, of 1 through 8;
- (10) General and Administrative expense (not to exceed 15% of the sum of the foregoing) on account of the planning, design and construction of the marine terminal, in accordance with the Port Authority's present accounting principles and procedures.

(d) In addition to all other payments to be made by the Port Authority to the City, the Port Authority shall pay to the City on or before the date of commencement of the letting of the permanent premises the sum of One Million Five Hundred Thousand Dollars (\$1,500,000) on account of the residual value of structures on the permanent premises to be incorporated in the marine terminal. The Port Authority shall also pay to the City a sum presently estimated at Two Million Five Hundred Seventy Nine Thousand One Hundred Thirty One Dollars and Sixty Eight Cents (\$2,579,131.68) as rent for the permanent premises during the period of construction which is presently estimated at three years. The actual payment shall be adjusted proportionately to reflect any construction period which is less than or which exceeds three years. The sum shall be paid in approximately equal annual installments during the period of construction and on a quarterly basis beginning on a date six months after the commencement of the letting of the interim premises. Such payments shall be made out of the proceeds of Port Authority bonds to be issued therefor.

(e) "Operation and maintenance expense" (also sometimes called "operation and maintenance cost" in this Agreement) as used in this Agreement shall mean the expense of the Port Authority which is directly attributable to the operation and maintenance of the terminal during the current year (other than the rent payable to the City by the Port Authority for the premises and general and administrative expense.) No deduction, allowance or provision for depreciation, except for automotive equipment and equipment ancillary thereto, is to be included in the operation and maintenance expense. It shall include the amount estimated to be required for deferred maintenance and a sum equal to fifteen (15%) percent of the foregoing operation and maintenance expense, for general and administrative expense, and an estimated Four Hundred Fifty Three Thousand Three Hundred Thirty Dollars (\$453,330.00) annually, representing principal amortization over a 20 year period and actual debt service, of the bonds issued by the Port Authority to provide funds for the payment of the residual value of structures on and the rent for the permanent premises during construction, as provided for in paragraph (d) above.

5. CASUALTY

(a) In the event of partial or total destruction of the marine terminal by a casualty which has been insured against, the Port Authority shall expend the insurance proceeds (other than rental insurance proceeds) in reconstruction, unless otherwise directed in writing by the City. In the event of such reconstruction there shall be no abatement of rental, but in the event of a written direction by the City not to perform reconstruction, this Agreement shall terminate with the effect of expiration, as of the date of the occurrence of the casualty, but in such event the Port Authority shall transfer to the City.

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the insurance proceeds retaining only a sum of money equivalent to the portion of the money paid to the City under paragraph (d) of Subsection D of Section 4 of this Agreement then not yet returned through payment of amortization as an element of operating and maintenance costs, as set forth in paragraph (e) of the said Subsection D. In the event there is a non-insured casualty which destroys the permanent premises or renders the same substantially unsuitable for the purposes of the letting under this Agreement, the City shall have the option to rebuild, and the letting shall be suspended until either (i) if the City does not rebuild, the term of the letting shall be deemed to have expired as of the date of the casualty, and the Port Authority shall be released from all obligation under this Agreement as of such date; or (ii) if the casualty occurs during the first seven years of the term of the letting and the City rebuilds, the letting shall recommence upon completion of construction and shall continue thereafter for the number of years (including part of a year) which remained under the original term of the letting at the time of the occurrence of the casualty; or (iii) if the casualty occurs during the last thirteen years of the term of the letting and the City rebuilds, and if the number of passengers handled through the marine terminal during the period of twelve months ending with the date of the casualty was in excess of 500,000, the letting shall recommence upon completion of construction and continue thereafter for the number of years (including parts of a year) which remained under the original term of the letting at the time of the occurrence of the casualty.

(b) In the event of damage to the interim premises by a casualty for which insurance is in force, then if in the opinion of the Port Authority the necessary repairing or rebuilding can be done within ninety (90) days, the Port Authority shall cause the same to be performed, and the rental shall not be abated. If, however, in the opinion of the Port Authority the damage is too great to be repaired within ninety (90) days, then the Port Authority shall convey the insurance proceeds to the City and shall have no obligation whatsoever in connection with repair or rebuilding, and the rental shall be abated for that portion of the interim premises rendered unsuitable for the period it is in such condition. In no event shall the obligation of the Port Authority exceed the repair or rebuilding which can be accomplished by use of insurance proceeds received.

6. REPAIRS

The Port Authority except in the event of casualty at all times during the term of the letting, shall keep, maintain and take good care of the permanent premises together with the piers, pier sheds, bulkheads (including the bulkhead on the boundary line of the permanent premises), pilings and all other buildings, structures and improvements thereof, if any, whether now on the premises or hereafter added, and shall make all necessary repairs, inside and outside, structural or otherwise, including the

rebuilding or replacement of the piers, piersheds, bulkheads, pilings and other buildings, structures or improvements thereon or any parts thereof, so as to keep and maintain them in good and sufficient repair and sufficiently painted.

7. ASSIGNMENT AND MORTGAGES

(a) The Port Authority shall not assign, mortgage, hypothecate, or encumber this Agreement or any part thereof. In the event this Agreement is assigned, pledged, mortgaged, hypothecated or encumbered in any way, the City, in addition to any other remedies it may have, may collect rent from any assignee of the premises, and apply the net rent collected to the rent reserved herein; but no such assignment or collection shall be deemed a waiver of this covenant or the acceptance of the assignee as a tenant or a release of the Port Authority from the further performance by it of the covenants on its part to be performed.

(b) Subject to the provisions of paragraph (a); the Port Authority may permit third persons to use and occupy part or all of the premises under subleases, permits and other contractual arrangements including without limitation thereto use under published tariffs, but only for purposes consistent with this Agreement and subject to all of the terms, covenants and conditions of this Agreement. The Port Authority shall not, however, sublet the premises for terms extending beyond the expiration of the term of this Agreement.

8. SNOW REMOVAL, POLICE AND FIRE PROTECTION

(a) The City shall not be responsible for removal of snow and ice from the premises. The Port Authority shall not place snow and ice upon any of the public streets, highways or marginal streets of the City.

(b) The City will have no responsibility for maintaining fire or police personnel in or on the premises. The City agrees that its Police Department will respond to calls from the Port Authority in the event of the commission of crime, rioting, disasters and other emergencies in the premises, and that its Fire Department will respond to calls to put out all fires and handle emergencies.

9. WAIVER OF LIABILITY

With respect to the permanent premises only, the Port Authority further covenants and agrees that the City shall not be liable for any damage, injury or liability that may be

sustained by the Port Authority or any other person whatsoever, or to their goods and chattels from any cause whatsoever, arising from or out of the occupancy of the permanent premises, including but not limited to damage by the elements, leakage, obstruction, or other defect of water-pipes, gas-pipes, soil-pipes, electrical apparatus, other leakage in or about the permanent premises or in and from any other part of the structure or structures included in the permanent premises, or the condition of the permanent premises or any part thereof. The Port Authority hereby expressly releases and discharges the City from any and all demands, claims, actions and causes of action arising from any of the aforesaid.

10. ACCIDENTS

(a) If at any time during the term, in any action or actions brought to recover damages for injuries to any person or persons (including death) or to property by reason of any accident happening on or in the premises, or by reason of any act or occupancy under this Agreement whether on or in proximity to the premises, a judgment shall be recovered against the City, then upon written demand being made upon it, the Port Authority, its successors or assigns, provided the notice hereinafter provided for shall have been given, shall pay to the City, its successors or assigns, the amount of such judgment, together with all reasonable and proper costs, expenses, and counsel fees to which the City may or shall be subjected in defense of such action and including any appeals taken with the consent of the Port Authority.

(b) The City shall give the Port Authority notice of all claims for injuries to any person or persons or damage to property as aforesaid made upon it and shall with reasonable promptness and diligence furnish to the Port Authority full information in regard thereto. The City shall not settle any such claims without the written consent of the Port Authority; but the Port Authority may, at its option, settle any such claim on behalf of the City, paying from its own funds to the claimant for a release in favor of the City. If any suit shall be brought against the City based upon any such claim, the City shall furnish to the Port Authority copies of all process and other papers served upon the City in connection with such suit. The Port Authority shall have the right to appear and defend any such suit and the City shall cooperate with the Port Authority in such defense. If any judgment or award shall be entered against the City upon the basis of any such claims, the City shall at the request of the Port Authority appeal therefrom at the sole cost and expense of the Port Authority and the City shall cooperate with the Port Authority in such appeal. All payments, expenditures and costs arising under this Section shall be elements of operating and maintenance costs.

11. CONDEMNATION

In the event of any condemnation or taking or conveyance in lieu of condemnation, whether of the whole premises or such part thereof as shall make it impracticable for the Port Authority to operate the remainder under this Agreement, then the letting under this Agreement shall come to an end immediately upon vesting of title in the condemning body, there shall be no award for the leasehold, and the Port Authority shall have no claim against the City, by reason of the insufficiency or claimed insufficiency of the award to reimburse the Port Authority for any unamortized portion of amounts expended by the Port Authority except to the extent required so that the Port Authority shall have a right to participate in the award and to receive such portion of the award, compensation or other consideration as shall equal the portion of the money paid to the City under paragraph (d) of Subsection D of Section 4 of this Agreement then not yet returned through payment of amortization as an element of operating and maintenance costs as set forth in paragraph (e) of the said Subsection D; the entire balance of the award, compensation or consideration shall be free of any claim by the Port Authority. In the event of condemnation of a part only of the premises, the Port Authority shall have the right at its option to remain in possession of the remaining portion of the premises under all of the terms and provisions of this Agreement, except that the rentals to be paid thereafter shall be as agreed upon between the Port Authority and the Commissioner, subject to the approval of the Board of Estimate.

12. INSURANCE

(a) The Port Authority shall for the benefit of the City, furnish Builders' Risk Insurance - Completed Value Form, during and in the course of construction, insuring against loss or damage by fire, standard extended coverage perils and such other perils as the Commissioner may from time to time certify as perils to be insured against, provided insurance against such perils so certified is commercially available. The policy shall name the City as sole insured and shall provide that loss, if any, shall be adjusted with and paid to the City only. The above insurance shall provide that all materials delivered to the site, whether or not attached to the realty, shall be determined to be the property of the City and covered by the above policy.

(b) In addition to the other insurance provided for in this Agreement, the Port Authority shall furnish the City prior to the commencement of any work Owners Protective Liability Insurance for the benefit of the City (and which may include the Port Authority) within limits of at least \$5,000,000 for one person, and \$5,000,000 for more than one person injured or killed in any one occurrence; \$5,000,000 for property damage; and \$40,000,000 excess coverage.

(c) During the term of the letting of the permanent premises, the Port Authority shall, for the benefit of the City, keep the permanent premises and all structures, improvements and fixed equipment thereon, insured against loss or damage by fire, lightning, floating ice, collision of any ship or vessel or floating object, tidal wave or flood (meaning the rising of navigable waters), snow, rain, sand, dust, windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles and smoke, and by action of the elements, meaning thereby sudden or unusual action of one or more of the physical forces of nature (excluding earthquake or volcanic eruption and excluding loss by any form of marine life or resulting from gradual decay or deterioration), and as a result of fall, collapse or subsidence caused by any of the perils or elements included hereunder; provided, however, that if any of the foregoing coverages shall not be commercially obtainable at the time of the execution of this Agreement, or shall thereafter cease to be commercially obtainable, the Port Authority shall be excused from obtaining such coverages and, provided, further, that if coverage of other or presently excluded hazards or different or additional coverages should become commercially obtainable, the Port Authority agrees to obtain such new coverages on demand by the Commissioner. All such insurance shall be in an amount equal to 100% of the replacement cost. The Port Authority shall also have the right to purchase rental insurance.

(d) Certified copies of policies issued by insurance companies evidencing the insurance required by this Section shall be filed in the office of the Commissioner, with proof of payment of premiums, and shall be subject to approval by the Commissioner as to form and minimum sufficiency of coverage, but the Port Authority may purchase additional insurance at higher limits. If the Port Authority, after written notice from the Commissioner, neglects or refuses or is unable to obtain any of the insurance required by this Agreement, then the City may procure the same, wherever available, and the Port Authority shall reimburse the City for the premiums. Except as set forth in paragraphs (a) and (b) hereof, such policy or policies shall provide that loss, if any, shall be payable to the Port Authority, which shall hold the proceeds of all insurance other than rental insurance in a fund for the purpose of repairs, rebuilding and replacement of the permanent premises, the pier, the piershed, the bulkhead and pilings, or any other structures, improvements or fixed equipment thereon damaged or destroyed by reason of any of the risks insured against by such policy or policies. Upon the completion of the repairs, rebuilding and replacements, if the amount of the proceeds of insurance exceeds the cost of such repairs, rebuilding and replacements the Port Authority shall pay such surplus to the City.

(e) The Port Authority at its own expense shall also furnish the City with liability insurance issued by a responsible company or companies approved by the Commissioner, for the protection of the City against any claims, suits, demands, causes of action or judgments by reason or personal injuries (including death) sustained by any person or persons, and for any claim of damage to property occurring on or in the premises, or arising out of or as a result of the operation, control or occupancy thereof by the Port Authority or any undertenants, assignees or occupants thereof whether on or in proximity to the premises. Such liability insurance shall provide limits of at least \$5,000,000 for property damage and at least \$5,000,000 for one person, and \$5,000,000 for more than one person injured or killed in any one occurrence, with a provision for \$40,000,000 excess coverage.

(f) The Port Authority may from time to time and at any time, elect to become a self-insurer as to part or all of the risks of loss described hereinabove in this Section 12, except those described in paragraph (a) and (b) above on the same terms and general conditions as are provided in standard insurance policies covering such risks then in general use in New York; and in the event of a loss which would have been covered by any such policy or policies, the Port Authority shall make available, out of its funds, an amount equivalent to that which would have been paid by an insurance carrier under the same circumstances, and shall apply the said amount in like manner as if said amount were the proceeds of an insurance policy or policies obtained in accordance with this Section.

(g) The Port Authority shall continue existing insurance coverages on the interim premises throughout the letting thereof.

(h) As between the City and the Port Authority, the Port Authority hereby undertakes and agrees to indemnify the City and save it harmless from any claims, suits, demands and causes of action by reason of personal injuries sustained by any person or persons, including death, and from any claims of damage to property, occurring on or in the premises, or arising out of or as a result of the operation, control or occupancy thereof by the Port Authority or any undertenants, assignees or occupants thereof whether on or in proximity to the premises.

[There is no paragraph (i) in this Section.]

(j) The Port Authority further agrees to execute and deliver any additional instruments and to do or cause to be done all acts and things, that may reasonably be requested by the Commissioner in accordance with this Agreement, fully to insure the City against all damage and loss as herein provided

for and to effectuate and carry out the intents and purposes of this Section. The policy or policies furnished may provide that there be no subrogation against the Port Authority.

(k) All premiums payable for insurance hereunder and self-insuring amounts in lieu of premium shall be elements of the operating and maintenance costs under this Agreement.

13. SURVEY AND CONDITION OF PREMISES

(a) A representative of the Commissioner jointly with a representative of the Port Authority shall make a survey of the permanent premises before or at the commencement of the term provided for herein.

(b) A representative of the Commissioner jointly with a representative of the Port Authority shall make a survey of the permanent premises a reasonable time before expiration of the term and shall make a schedule of the condition thereof at the time of such survey. If, after notice, the Port Authority shall fail, neglect, refuse or delay to join in making such survey, then the City may make such survey independently and the Port Authority shall be deemed to have adopted such survey as binding upon it as to condition.

14. DEPTH OF WATER

The Port Authority shall perform or cause to be performed such dredging or other work in the slips adjacent to the marine terminal as may be required from time to time in the opinion of the Port Authority during the term under this Agreement. On the expiration or earlier termination of the term of the letting, the Port Authority shall perform or cause to be performed the necessary dredging or other work required to provide a depth thirty-eight (38) feet below mean low water in the outer berths, and thirty-four (34) feet below mean low water in the inner berths. These depths are agreed upon as providing capacity for vessels now in use, and other depths will be provided by the Port Authority (as agreed upon in writing by the Commissioner) if changes in design of vessels in the passenger trade make such depths advisable.

15. SUNKEN CRAFT

(a) If during the term of this Agreement, the waters in the permanent premises shall become obstructed in whole or in part by the sinking of any waterborne craft, other than

waterborne craft owned or operated by the City, the Port Authority, after notice from the Commissioner, shall promptly remove such obstruction, or cause the same to be removed, the cost thereof to be included in operating and maintenance costs. If, after notice from the Commissioner the Port Authority fails to remove such obstruction, the City may in its discretion undertake the removal thereof, and in such event the Port Authority shall reimburse the City for the reasonable expenses so incurred. If during the term of this Agreement the waters in the premises shall become obstructed in whole or in part by the sinking of any waterborne craft owned or operated by the City, through no fault or negligence of the Port Authority, then the City, after written notice served upon the Commissioner by the Port Authority, shall promptly remove such obstruction or cause the same to be removed, without cost or expense to the Port Authority. If, after notice from the Port Authority, the City fails to remove such obstruction, the Port Authority may in its discretion undertake the removal thereof, and in such event the City shall reimburse the Port Authority for the reasonable expenses so incurred.

(b) The Port Authority shall save harmless the City from any damages or claims for damages that may arise by reason of the presence in said waters of any sunken waterborne craft, other than one owned or operated by the City and the City shall save harmless the Port Authority from any damages or claims for damages that may arise by reason of the presence in said waters of any sunken waterborne craft owned or operated by the City.

16. WATER SERVICE AND SEWER RENTS

(a) The City shall provide and maintain all water supply lines up to the perimeter of the premises. The Port Authority shall pay the City for all water consumed at the City's established rates, and for all sewer rents applicable to the premises at the City's established rates. The Port Authority, at its own cost and expense, shall install and maintain such meter or meters as may be determined by the Department of Water Supply, Gas and Electricity as best suited for determining the amount of water consumed or used within the premises.

(b) The City shall have no liability for the costs of any heat, gas, coolant and electricity furnished to the premises, except as included in operating and maintenance costs.

purposes. The City will cooperate fully with the Port Authority in regard to construction of the marine terminal. To that end, the City will make available as needed portions of the marginal street and other neighboring areas required for construction purposes, including without limitation thereto the receipt and storage of equipment, materials and supplies. The precise areas and terms of use shall be set forth in Occupancy Permits requiring nominal fees or rentals, to be issued by the Commissioner on the request of the Port Authority.

18. EASEMENTS

The letting of the premises is subject to any existing easements in favor of the City for city-owned utilities and the rights of gas, electricity and other public utility companies to maintain facilities therein. The City hereby represents to the Port Authority that there are no such easements interfering or which might interfere, with the construction contemplated under this Agreement, and covenants that the Port Authority may use without additional charge all easements on or through the premises required by its operations thereof.

19. POLICY IN REGARD TO CITY ORDINANCES AND REGULATIONS

In the construction, improvement, operation and maintenance of the premises, the Port Authority will as a matter of policy, conform to the enactments, ordinances, resolutions and regulations of the City and its various departments, administrations, boards and bureaus, in regard to the construction and maintenance of buildings and structures, and in regard to health and fire protection on the premises, which would be applicable if the Port Authority were a private corporation, to the extent that the Port Authority

finds it practicable so to do, without interfering with, impairing or affecting the efficiency and economy of its marine terminal operations, or its ability to operate the marine terminal on a self-supporting basis, or its obligations, duties and responsibilities to the two States, its bondholders and the general public; but the decision of the Port Authority as to whether it is practicable so to do shall be controlling. To that end, and without hereby altering or enlarging the obligations of the Port Authority expressed in Section 17, the Port Authority shall submit copies of the plans and specifications for buildings and structures to the appropriate City officials and shall consult with them with respect thereto, and shall receive their comments and suggestions thereon.

20. AUDIT

The Port Authority shall keep, and require others to keep, in a manner consistent with accepted accounting practice, complete records and accounts in regard to the operation, maintenance and construction or other capital development, and of all gross revenues and expenses, arising out of the operation of the permanent premises; and shall allow the City or any duly authorized representative of the City, at all reasonable times, to examine said records and accounts, also to examine all contracts and agreements relating to construction, maintenance and operation and all leases or agreements now or hereafter made with any and all tenants, occupants and users thereof. The Port Authority shall also make available such other documents as reasonably may be required by the City for the purposes of verifying, if it shall so desire, the statement or statements furnished by the Port Authority.

21. INSPECTION

The City through its properly designated officials and employees in the performance of their official duties shall at all times have the right of free access to all portions of the premises for purposes of inspecting same. The Port Authority shall correct conditions noted by the City in such inspections, in sixty (60) days after notice except where in the opinion of the Port Authority other action should be taken.

22. COVENANT OF QUIET ENJOYMENT

The City agrees that the Port Authority on paying the rent herein reserved promptly when due and on performing all of the other terms, covenants and conditions set forth in this Agreement promptly as required, shall and may peaceably and quietly have, hold and enjoy the premises for the term hereinbefore specified unless such term shall cease, close or expire sooner.

23. FEES AND EXPENSES

If the Port Authority shall default in the performance of any covenant on its part to be performed by virtue of any provision of this Agreement, the City may, unless the Port Authority takes action to remedy such default within thirty (30) days of receipt from the City of a notice of such default, perform the same for the account of the Port Authority. However, if such default creates an emergency condition the City may perform such work upon the failure of the Port Authority to take such action as soon as may be practicable after the receipt of the said notice. If the City, in pursuance of this Section, pays any sum of money by reason of the Port Authority's failure to comply with any provision of this Agreement, or if the City is compelled to incur any expense in instituting, prosecuting or defending any action or proceeding instituted by reason of any default of the Port Authority, the sum or sums so paid by the City, together with interest, costs and damages shall be deemed to be additional rent hereunder and shall be due from the Port Authority on the first day of the month following the receipt by the Port Authority of a statement of such expense, interest, costs or damages certified to by the Comptroller of the City. Such payments when made, less any portion representing actual cost to the City, shall be included in operating and maintenance costs.

24. SURRENDER BY RESOLUTION

Except as otherwise expressly provided in this Agreement, no act done by the City, or its officers or agents, during the term hereby granted, shall be deemed an acceptance of a surrender of the premises, and no agreement of surrender, to accept a surrender of the premises shall be valid, unless the same shall be duly authorized by resolution of the Board of Estimate.

25. BINDING ON SUCCESSORS

Each and every of the terms, covenants and provisions of this Agreement shall inure to the benefit of and be binding upon the parties hereto and, except as herein otherwise provided, their respective legal representatives, successors and assigns.

26. SIGNS AND ADVERTISING

No advertisement, notice or sign shall be placed or fixed to any of the structures, appurtenances, or any other part of the outside of the premises, except such as shall have

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first received the written approval of the Commissioner and of the Port Authority. The Port Authority will remove from the interior signs not related to operation of the marine terminal to which the City objects. The City shall have no right to install any interior signs.

27. SECTION HEADINGS

The section or subsection headings are for reference purposes only and shall not be deemed descriptive of the sections or subsections.

28. NOTICES

Except as herein otherwise provided, all notices required to be sent by either party to the other shall be in writing and shall be personally delivered or forwarded by certified mail, addressed as follows:

To the Port Authority

Executive Director of the Port Authority
(or his successor in duties)
111 Eighth Avenue
New York, New York 10011

To the City

Commissioner of the Department of Ports and
Terminals of the Economic Development
Administration
(or his successor)
Battery Maritime Building
New York, New York 10004

All communications shall be forwarded to the above addresses until notice in writing of change of address is forwarded by either party to the other by certified mail.

29. NON-LIABILITY

Neither the Commissioners of the Port Authority nor any of them, nor any officer, agent or employee thereof, nor the Commissioner acting for the City, nor any of their agents or employees, as individuals other than in their official capacity, shall be charged personally by the City or the Port Authority (as the case may require) with any liability, or held liable to the City or to the Port Authority (as the case may require) under any term or provision of this Agreement, or because of its execution or attempted execution, or because of any breach, or attempted or alleged breach thereof.

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30. TITLE

In the event that it shall be or become necessary for the City to obtain a grant or grants of lands under the water from the State of New York permitting or confirming the power of the City to lease all or any part of the premises for the purposes of this Agreement, the City shall obtain the same at its own cost and expense; and the City shall hold the Port Authority harmless from and against any claims and demands of the State of New York arising from any interest of the State of New York in any part of the premises.

31. CONSOLIDATED OPERATIONS

(a) In implementation of the determinations of the City and of the Port Authority based on the study hereinabove mentioned the City and the Port Authority agree to do everything within their power to effectuate the consolidation of passenger vessel service at the marine terminal. To that end, the City and the Port Authority will terminate existing leases and other agreements (except this Agreement) authorizing the use of waterfront property for passenger vessel operations, wherever such terminations are within their contractual power, so that within thirty (30) days after commencement of the letting hereunder, such terminations shall be effective. In any case where the City or the Port Authority has no contractual right so to terminate, it will endeavor by negotiation to provide for such termination. After the execution of this Agreement on behalf of the City and the Port Authority, neither will enter into any agreement with owners or operators of or agents for passenger vessels, authorizing the use of property for any operations in connection with such vessels except with the provision that the term of the use under each such agreement shall expire within thirty (30) days after the commencement of operation of the marine terminal under this Agreement. Further, except as may be expressly required by existing agreement or agreements, by statute, or by order of a court of competent jurisdiction, and during the term of the letting under this Agreement, neither the City nor the Port Authority will issue any work permit or other construction approval or consent whereby structures suitable for such operations may be provided whether by alteration of existing structures, or by new construction, anywhere within the jurisdiction of the City or the Port Authority. The making of provisions for emergency operation elsewhere shall not be deemed a breach of this covenant. An occasional, casual or inadvertent berthing of a passenger vessel elsewhere on City or Port Authority property shall not be deemed a breach, but all revenues therefrom shall be payable to the Port Authority and when so paid shall be treated as receipts from operation of the marine terminal. If with the concurrence of

the Port Authority, the City, in implementation of this covenant, refuses to issue a work permit requested for construction on privately-owned property and such refusal results in a cause of action in which the City is actually required to respond in damages, then, provided (i) the City has given the Port Authority an opportunity to participate in the defense of such action (which shall include settlement and appeal, both as required by the Port Authority); (ii) that the judgment is not entered on mere default or consent and shall have been appealed to the highest authority required by the Port Authority, and (iii) have been paid, the Port Authority will reimburse the City, such sum reimbursed to be an element of operating and maintenance costs.

(b) During the term of the letting hereunder and any extension thereof and for so long thereafter as the marine terminal is (i) actually being operated so that the consolidated passenger vessel operations of the Port of New York are being handled there and (ii) remains safe, sound, and of sufficient capacity to handle all such vessels serving or desiring to serve the Port of New York and their passengers comfortably, conveniently, and in a manner consistent with the standards of passenger vessel terminal operation in the major ports of the world, neither the City nor the Port Authority shall promote, finance, establish, construct, operate, or maintain any pier, wharf, bulkhead, dock, terminal or other facilities for the accommodation of passenger vessels, or authorize any other person so to do; but this covenant shall remain in effect for no more than fifty years after the expiration of the original term of the letting of the permanent premises. In the event that the City shall breach the covenants contained in this Section, the Port Authority shall have the right to terminate this Agreement on the giving of thirty (30) days' written notice, and at the expiration of the notice, the Port Authority shall have no liability or obligation to pay the rent reserved herein for any portion of the term which would have remained but for such termination.

(c) This Agreement shall not be effective unless prior to the commencement of the letting a companion agreement is made among the Port Authority, the City and those steamship operators presently intending to use the facility, which shall contain a provision that neither the Port Authority nor the City will permit use of any properties under its jurisdiction or operated by it for the handling of passenger vessels as a marine terminal operation except as may be required by emergency weather conditions or federal governmental order. Such companion agreement shall contain further an undertaking by the various steamship operators to operate no passenger vessels to any terminal or stopping place in the Port of New York other than the interim premises during the term of the letting thereof hereunder, or other than the marine terminal during its operation.

(d) Further, this Agreement shall not become effective unless agreements for operation of the piers constituting the interim premises as agents of the Port Authority shall have been made between the Port Authority and persons, firms or organizations capable of acting as such agents, in form and substance satisfactory to the Port Authority. The Port Authority undertakes to progress negotiation of such agency agreements with due diligence. Such agreements shall contain provisions satisfactory to the Commissioner and subject to his approval.

(e) Upon the execution of agreements of surrender of lease by the City and the respective present lessees of properties known as Piers #40, #84, #88 and #92, North River, more particularly described in the said leases, the said leases shall terminate as of the date to be mutually agreed upon by the parties and set forth in the said agreements. The Commissioner is authorized, without further approval of the Board of Estimate, to execute in behalf of the City such agreements and terminate the said leases. Said agreements shall contain a provision that the lessee of the respective properties shall remain liable for any and all obligations which have accrued against it under the terms, conditions and covenants of its lease to and including the effective date of surrender and termination of the lease.

32. TARIFFS

The Port Authority shall have the right to fix the rates of dockage and wharfage and the amounts of passenger fees, visitors' fees and parking rates, for all users of the marine terminal, and shall have the right to change the same at annual intervals. All such rates and charges shall be incorporated in published tariffs. However, it shall be the endeavor of the Port Authority to scale such charges so as to cause the receipts from the various sources of revenue hereinabove listed to cover at least all charges payable to the City under the provisions of Subsections A and B of Section 4 of this Agreement, having due regard to estimated maintenance and operating costs, and to increases thereof which may be occasioned by the passage of time and the aging of the facility. The Port Authority shall have the right to require the City to hold for project purposes a portion of the funds in the deferred maintenance reserve, payable to the City under this Agreement at the expiration thereof.

33. DEFICIT PAYMENTS

If in the opinion of the Port Authority, after an assessment of the situation and the condition of the marine terminal during the nineteenth year of the term of the letting thereof, the revenues theretofore received and anticipated to be received during the twentieth year of the term will not suffice to pay off the basic rental due to the City under the provisions of Subsection A of Section 4 plus the operating and maintenance costs of the twenty-year term, the Port Authority shall notify the City to that effect not later than the nineteenth anniversary of the date of commencement of the letting of the permanent premises; and the Port Authority shall thereupon have the option to continue the term of the letting beyond the twentieth anniversary of such date for such period up to the twenty-fifth anniversary thereof as it may elect (except that the renewal term shall be not less than a year) on all the terms and conditions herein set forth relating to the permanent premises, except that the rental for the period subsequent to the said twentieth anniversary shall be at an annual rate which shall be the greater of (i) \$1,000,000 or (ii) one-half the excess of receipts from operations over current operating and maintenance costs. The remainder of the receipts during such extended term shall be used to discharge current operating and maintenance costs and all accumulated deficits.

34. RENEWAL

The Port Authority shall have an option to renew the letting of the permanent premises for a period extending beyond the initial term and any extended term, on all the terms, provisions, covenants and conditions of this Agreement, except that the rental payable to the City for the renewal term of the letting and the extent of the renewal term shall be as agreed upon between the Commissioner and the Port Authority and approval by the Board of Estimate during the nineteenth year of the initial term, or later if so agreed in writing formally executed by the Commissioner and the appropriate officer of the Port Authority.

35. ANTI-DISCRIMINATION

The Port Authority, in keeping with its long and well-established policy not to discriminate against any person, agrees that in the performance of work, labor and services by it under this Agreement, there shall be no discrimination against any person because of age, sex, religion, race, creed, color, national origin or ancestry.

36. FEDERAL MARITIME COMMISSION

This Agreement shall be null, void and of no effect unless and until the same shall have been approved by the Federal Maritime Commission, as may be required by law.

37. MISCELLANEOUS

Except as herein otherwise expressly provided, the Port Authority shall have full power and discretion to proceed with the financing, rehabilitation, expansion, improvement, development, operation and maintenance of the marine terminal and of the interim premises, and to enter into such contracts, agreements, subleases or other arrangements with respect thereto as it may deem necessary and desirable, and all matters connected therewith, including but not limited to, all details of financing, construction, leasing, charges, rates, tolls, contracts, and operation shall be within the sole discretion of the Port Authority; and the decisions of the Port Authority in connection with any and all matters concerning the marine terminal and the interim premises shall be controlling, provided that all such things shall be done by the Port Authority in its own name and on its own credit.

38. RIGHT OF ACCESS

The Port Authority, its lessees, permittees, contractors and all persons, firms and corporations doing business with it or with any of them, shall have a right of access at all times to the premises over the city streets and the marginal areas at or bordering the same. In its use of the upland on the shore side of the outer berths, which upland borders or is contiguous to the permanent premises, and in its permissions to others to use the same, the City shall safeguard and provide for such right of access. The Port Authority shall permit use of the outer berths for navigational maneuvering by others, provided it shall not constitute unreasonable interference with use thereof by users of the marine terminal.

39. ILLEGAL USE DETERMINATION

The Port Authority covenants and agrees that in the event the use or a proposed use of the premises as set forth in Section 1 of this Agreement, is declared illegal by a court of competent jurisdiction, neither the City nor the Commissioner, nor any of their agents, officers or employees shall be liable for any damages arising out of or related to such illegal use or proposed use; and the Port Authority shall have the right to terminate this Agreement with the effect of expiration, as of the date of such judgment.

40. TERMINATION ON DEFAULT

If the Port Authority shall fail to perform, keep and observe any of the terms, covenants or conditions herein contained on the part of the Port Authority to be performed, kept, or observed, the Commissioner may terminate this Agreement, unless the Port Authority takes action to remedy such default within sixty (60) days of the service of a notice of such default and cures such default within a reasonable time after such default, or, if such default creates an emergency condition, unless the Port Authority shall take action as soon as may be practicable after the receipt of such notice. This Agreement shall terminate upon the receipt by the Port Authority of a notice of termination served by the Commissioner as herein provided and shall expire in the same manner and to the same effect upon such receipt of said notice as if that were the expiration of the original term.

41. DEFAULT

The Port Authority covenants that if any default be made by it in the payment of the rent or any part thereof herein reserved, or if it shall default in the performance of any of the other covenants and agreements herein contained, upon the failure of the Port Authority to take action to remedy such default within sixty (60) days of the service from the City of a notice of such default, and to cure such default within a reasonable time, the Commissioner may, in lieu of exercising the right to terminate this Agreement in accordance with Section 40, and in addition to the right to regain possession by means of summary proceedings or any other method permitted by law, upon resuming possession, relet the premises without terminating this Agreement, or in any manner affecting the obligation of the Port Authority to pay, as damages, the amount herein covenanted to be paid as basic rental, in which event, however, there shall be credited to the account of the Port Authority the amount received from such reletting after deducting the expenses of such proceedings as may have been necessary in order to regain possession under this provision, as well as the costs of reletting the property; provided that the City, in the event of such reletting, shall do so on the most favorable terms and conditions commercially available; and the execution of a new lease of the premises regardless of the terms or provisions thereof, shall not terminate the Port Authority's liability or obligations under this Agreement, which shall remain in full force and effect for the full term of this Agreement.

42. RIGHT OF ENTRY

In the event that this Agreement shall be terminated as hereinbefore provided, or by summary proceedings or otherwise, or in the event that the premises or any part thereof shall otherwise be abandoned by the Port Authority during the term of this Agreement, the City or its agents, servants or representatives may immediately or at any time thereafter reenter and resume possession of the premises or such part thereof and remove all persons and property therefrom either by summary dispossession proceedings or by a suitable action or proceeding at law or by force or otherwise, without being liable for any damages therefor. Except for reentry following default, reentry by the City shall, however, be deemed an acceptance of a surrender of this Agreement.

43. DAMAGES AS RENT

In the event that the City reenters or takes possession of the premises in the manner or by the means provided or referred to in Section 41 of this Agreement, the amount of damages or deficiency shall become due and payable annually on the first day of the first calendar month of each year after the amount of such damage or deficiency shall have been ascertained in the manner provided in Section 41 of this Agreement, and separate actions may be maintained annually to recover the damage or deficiency then due, without waiting until the end of the term; and no notice or demand shall be necessary in order to maintain such action.

44. NO RIGHT OF REDEMPTION

The Port Authority expressly waives any and all rights of redemption granted by or under any present or future laws, whether in the event that the Port Authority is dispossessed or evicted for any cause or in the event that the City obtains possession of the premises, by reason of the violation by the Port Authority of any of the covenants and conditions of this Agreement or otherwise.

45. CONCESSIONS

The Port Authority shall provide such consumer services as shall be necessary, convenient and desirable to accommodate users of the marine terminal. In so doing, it shall apply the standards and procedures followed by the Port Authority in ensuring the provision of a high level of each appropriate kind of consumer services

at Port Authority terminal facilities. The Port Authority shall in its discretion, select the agents, contractors, tenants, licensees, permittees or other occupants who shall perform the consumer services at the marine terminal, provided that the Commissioner, within thirty (30) days after written notice to be given within ten (10) days of the selection of any such by the Port Authority, may disapprove any such, provided that such disapproval shall be in writing and shall be expressly based upon a report rendered to him either by the Police Commissioner, the Commissioner of Licenses or the Commissioner of Investigations, that under the statutes, ordinances or rules and regulations administered or enforced by such Departments, such entity selected is disqualified from performing the services proposed to be performed. In the event of disapproval the Port Authority will exercise its right of termination as to such concessionaire.

46. ADDITIONAL PIER

If at any time during the letting of the permanent premises the City notifies the Port Authority that it is about to accept a genuine offer to lease Pier 92 for a term of one year or more, the Port Authority shall have the right to lease the said pier, to be operated as part of the permanent premises, for the same term and at the same rental as shall have been offered.

47. ENTIRE AGREEMENT

This Agreement consists of pages 1 through 7, 7A, 8 through 19, 19A, and 20 through 30, together with Exhibits 1, 2 and 3. It constitutes the entire agreement of the City and the Port Authority on the subject matter and may not be changed, modified, discharged or extended, except by written instrument, duly executed by the City and the Port Authority.

IN WITNESS WHEREOF, the City and the Port Authority have caused this Agreement to be executed the date first above written.

ATTEST:

/s/ Norman Frankenheimer

THE CITY OF NEW YORK

By /s/ William F. Tobin
Acting Commissioner R.H.R.

ATTEST:

/s/ Mildred C. Porth
Assistant Secretary

THE PORT OF NEW YORK AUTHORITY

By /s/ Austin J. Tobin
Executive Director

APPROVED AS TO FORM

/s/ J. Lee Rankin
Corporation Counsel
M.H.

APPROVED AS TO FORM

/s/ Patrick J. Falvey
for General Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:
CITY OF NEW YORK)

On this 17th day of January, 1969, before me personally came William F. Tobin, Acting Commissioner of the Department of Ports and Terminals of the Economic Development Administration, to me known and known to me to be the person described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same.

/s/ Roy H. Rudd

ROY H. RUDD
Notary Public, State of New York
No. 24-3392575
Qualified in Kings County
Term Expires March 30, 1969

100

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

On the 17th day of January, 1969, before me personally came Austin J. Tobin who, being by me duly sworn, did depose and say that he resides in New York, New York at 200 East 66th Street that he is the Executive Director of The Port of New York Authority, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Commissioners of the said corporation; and that he signed his name thereto by like order.

/s/ Albert J. Buckley
(notarial seal and stamp)
Notary Public, State of New York
No. 60-0479050
Qualified in Westchester County
Commission Expires March 30, 1969

STATE OF }
COUNTY OF } ss.

On the _____ day of _____, 196____, before me personally came _____ who, being by me duly sworn, did depose and say that he resides in _____

that he is the _____ of _____

one of the corporations described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the board of directors of the said corporation; and that he signed his name thereto by like order.

(notarial seal and stamp)

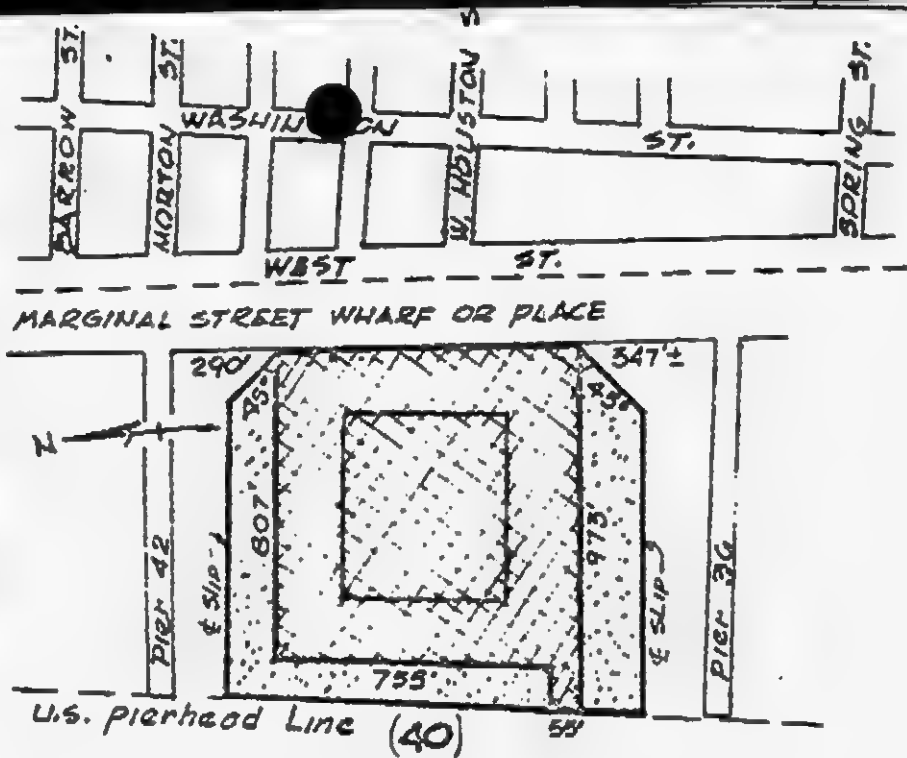
Schedule of Rental Payments (1)

Exhibit 3
in Thousands

	Balance at Beginning of Year	Guaranteed Rent to City (2)	Interest Assumed @ 5%	Total Payment
1969	\$60,000		\$ 3,000	\$ 3,000
1970	60,000	2,386	3,000	3,000
1971	60,000	2,368	3,000	5,386
1972	57,614	2,351	2,881	5,249
1973	55,246	2,332	2,762	5,113
1974	52,895	2,313	2,645	4,977
1975	50,563	3,217	2,528	4,841
1976	48,250	3,217	2,413	5,630
1977	45,033	3,217	2,252	5,469
1978	41,816	3,217	2,091	5,308
1979	38,599	3,217	1,930	5,147
1980	35,382	3,217	1,769	4,986
1981	32,165	3,217	1,608	4,825
1982	28,948	3,217	1,447	4,664
1983	25,731	3,217	1,287	4,504
1984	22,514	3,217	1,126	4,343
1985	19,297	3,217	965	4,182
1986	16,080	3,217	804	4,021
1987	12,863	3,217	643	3,860
1988	9,646	3,217	482	3,699
1989	6,429	3,217	320	3,537
1990	3,212	3,212	161	3,373
1991	-0-	\$60,000	\$42,114	\$102,114

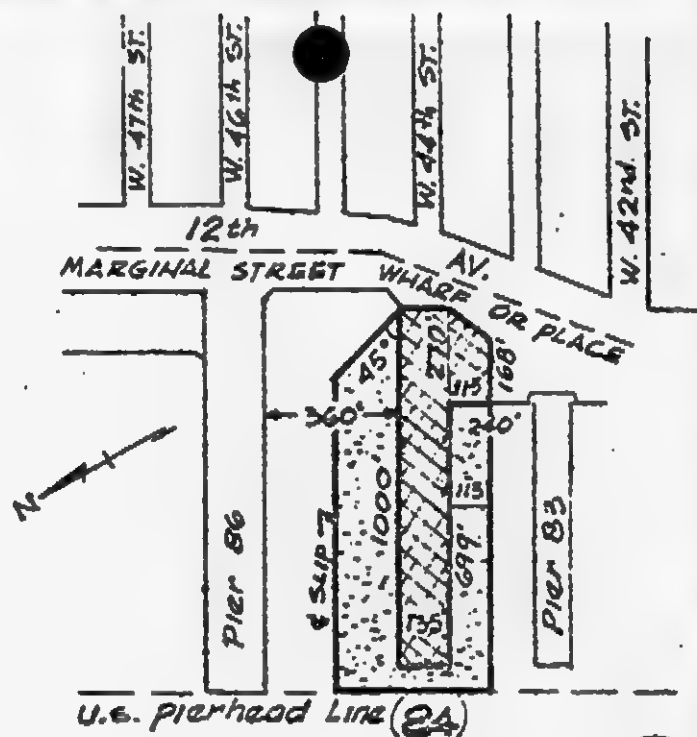
(1) Based on assumption of commencement of term of entire permanent terminal within three years after January 1, 1969. If completion of entire premises is delayed the schedule is subject to adjustment of the annual payments of the basic rental required under Paragraph 4A to reflect (a) partial completion and (b) continued consequent deferral of part or all of component attributable to principal.

(2) Assumed initial bond issue of \$60,000,000 pursuant to Paragraph 3. This table of rental payments is subject to adjustment based on actual and final costs and shall provide for repayment as under Paragraph 4A.



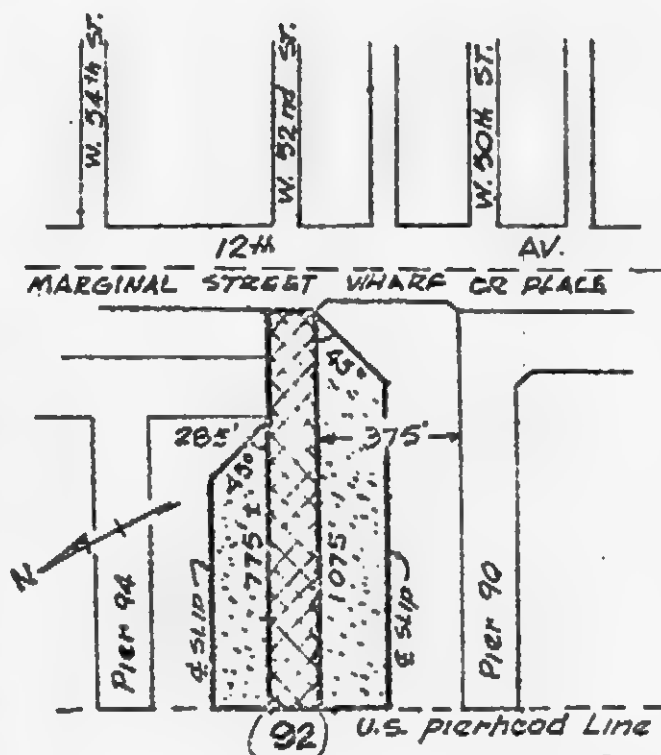
NORTH RIVER

①



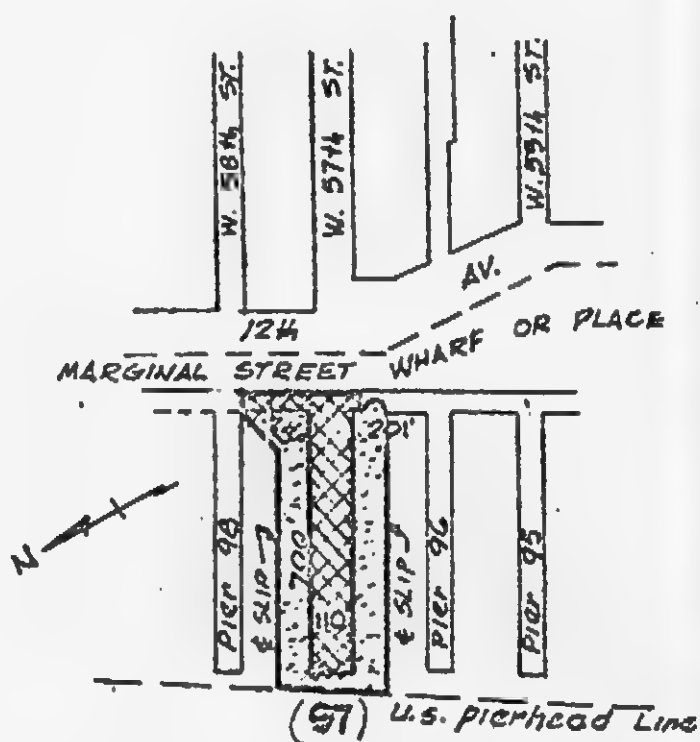
NORTH RIVER

②



NORTH RIVER

③



NORTH RIVER

④

EXHIBIT 2

THE INTERIM PREMISES

SCALE 1" = 600'

DATE: OCTOBER 1968

103

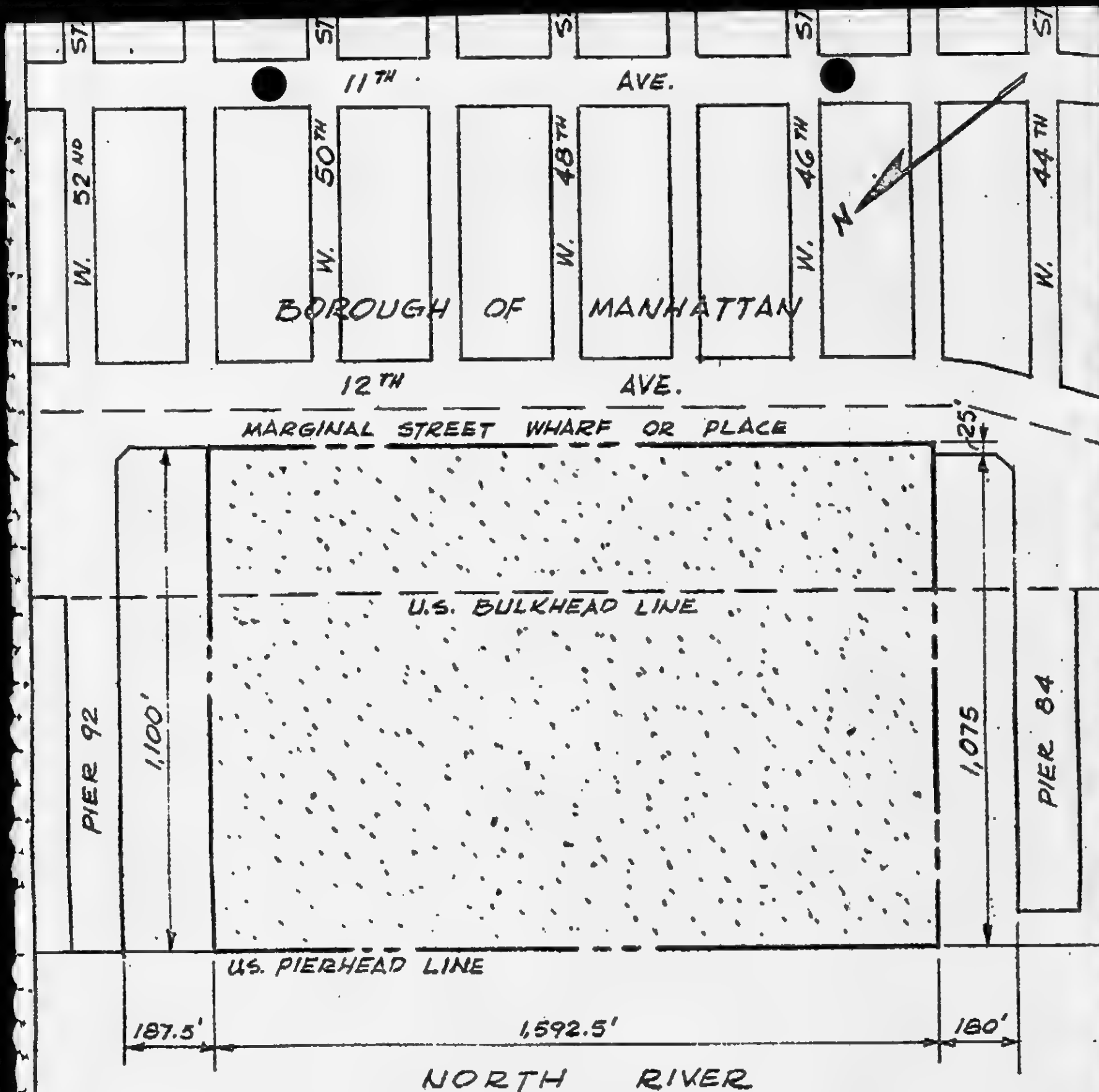


EXHIBIT-1
THE PERMANENT PREMISES

SCALE 1" = 300'

I, MILDRED C. PORTH, the Assistant Secretary of THE PORT OF NEW YORK AUTHORITY, a body corporate and politic, created by compact between the States of New York and New Jersey with the consent of the Congress of the United States, hereby certify

THAT annexed hereto is a true and correct transcript from the Official Minutes of a meeting of The Port of New York Authority, duly held on the 14th day of November, 1968, containing the following resolution or resolutions:

Consolidated Passenger Ship Terminal

THAT (except as hereinafter stated) it appears from the Official Minutes of The Port of New York Authority that the said resolution or resolutions were duly and unanimously adopted by the Commissioners of The Port of New York Authority and are now in full force and effect.

No exceptions.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the Official Seal of The Port of New York Authority this 14th day of January, 1969.

/s/ Mildred C. Porth
Assistant Secretary of
The Port of New York Authority

RESOLVED, that the Executive Director be and he hereby is authorized acting on behalf of the Port Authority to enter into an agreement of lease with the City of New York covering the construction, and the leasing for a period of twenty years, of a passenger vessel terminal on approximately the site now occupied by Piers 86, 88 and 90, Hudson River; the Port Authority to construct the terminal and finance a portion of the cost thereof (\$4,100,000) estimated to be the value of the existing structures incorporated into the final structure and the capitalized value of site rental during construction with the City to finance the balance of approximately \$60,250,000 by a bond issue; the Port Authority to pay as annual rent the sum required each year to amortize the City's borrowings for construction purposes over a period of twenty years and to pay a portion of the excess, if any, of revenues over such payments and operating and maintenance costs, the Port Authority to operate and maintain the permanent terminal, publishing tariffs on an annual basis which shall be structured to return funds necessary to amortize construction, pay operating and maintenance costs and provide a reserve of not more than the total of the three highest years amortization amounts; further, the Port Authority to rent at existing rentals and for the period of construction only, or less as may be required for operations, Piers 40, 84, 90, 92 and 97, and to operate them or such of them as may be required, as an interim passenger vessel terminal during construction; the City and the Port Authority to undertake to permit no passenger vessel use of any facilities owned by or under their jurisdiction for a period to commence with the letting and to extend fifty years after the expiration of the original twenty-year term of the lease, or only so long as the new facility is being operated as a consolidated passenger ship terminal and is satisfactory for such business using or intending to use the Port of New York, whichever is the shorter; the Port Authority to have options for renewal in order to provide for recovery of deficits if existing, or to provide for possible extension, on a rental to be agreed upon; the agreement to be subject to the approval of the Federal Maritime Commission is required, and the form of the agreement to be subject to the approval of General Counsel or his designated representative; and be it further

RESOLVED, that the Executive Director be and he hereby is authorized acting on behalf of the Port Authority to enter into an agreement with the City of New York and steamship lines operating passenger vessels to the City of New York providing for use by the said lines of the interim terminal and of the permanent terminal, exclusive of all other facilities, and stating the terms of financing, construction and operation of the facilities including the bases for tariffs and adjustments thereof, with provision that under no circumstances will the total sum collected from steamship lines during the original 20-year term exceed \$20 per passenger; the agreement to be subject to the approval of the Federal Maritime Commission if required and the form thereof to be subject to the approval of General Counsel or his designated representative.

BOARD OF ESTIMATE

CITY OF NEW YORK

RECEIVED
Dec. 20 9:23 AM '68

ECONOMIC DEVELOP. ADMIN.
BATTERY MARITIME BUILDING

(Cal. No. 9-A)

Resolved, By the Board of Estimate, if executed within 60 days after the adoption thereof, that the Commissioner of the Department of Ports and Terminals, pursuant to Section 707a of the New York City Charter be and hereby is authorized to execute a lease, as follows:

Lessee-The Port of New York Authority, 111
8th Avenue, New York, N.Y. 10011

Use of Premises-(a) Permanent Premises:
Consolidated passenger ship terminal; and
(b) Interim Premises: For the use of all
passenger ships during the estimated three
year period of construction of the permanent
premises.

Premises-(a) Permanent Premises: A new
four-level, six-berth structure to be con-
structed on the site of existing Piers 86,
88 and 90, North River, Manhattan; and (b)
Interim Premises: Piers 40, 84, 92 and 97,
North River, Manhattan.

Term-(a) Permanent Premises: 20 years,
commencing on the first day of the calendar
month next following the completion of con-
struction of the two southerly finger piers
of the project, but not later than 48 months
after the commencement date of the lease for
the interim premises; and (b) Interim Premises:
Commencing on the day following surrender of
the interim premises by the present lessees,
and shall expire on the thirtieth day after
the completion date of the permanent premises.

Rental-(a) Permanent Premises:

Basic Rental-In accordance with a schedule
attached to the Lease, of rents sufficient to
amortize in 20 years the entire construction
cost plus debt service costs.

Additional Rental-Receipts over and above:
(1) the amount of the Basic Rental and (2) the
cost of operation and maintenance, will be dis-
bursed as follows: the first \$750,000 to the
City; the second \$750,000 to the Port Authority
Reserve Fund; any money remaining in the Reserve
Fund at the termination of the letting to be paid
to the City, plus interest.

Additional Payments to the City-(1)
Prior to the letting a lump sum of \$1,500,000
representing the residual value of the struc-
tures presently occupying the permanent premises,
and (2) the amount of \$2,579,131.68 as rent for
the permanent premises during the period of
construction, now estimated as three years.

(b) Interim Premises: \$1,821,451.75 per year

A true copy of resolution adopted by the Board of
Estimate on NOVEMBER 21, 1968.

/s/ Ruth W. Whaley

Secretary.

BOARD OF ESTIMATE
CITY OF NEW YORK

Received Dec. 20
9:23 AM '68

ECONOMIC DEVELOP. ADMIN.
BATTERY MARITIME BUILDING

(Cal. No. 9-B)

Resolved, That the Board of Estimate hereby authorizes the Commissioner of the Department of Ports and Terminals to execute agreements and terminate leases at piers 40, 84, 88 and 92, North River, Manhattan, presently in effect.

A true copy of resolution adopted by the Board of Estimate on NOVEMBER 21, 1968.

/s/ Ruth W. Whaley

Secretary.

BOARD OF ESTIMATE
CITY OF NEW YORK

Received
December 20
9:23 AM '68

ECONOMIC DEVELOP. ADMIN.
BATTERY MARITIME BUILDING

(Cal. No. 9-C)

Resolved, That the Board of Estimate hereby authorizes the Commissioner of the Department of Ports and Terminals to execute a companion agreement between The City of New York, the Port of New York Authority and Passenger Vessel Companies restricting all passenger vessel operations within the Port of New York to the proposed Consolidated Passenger Ship Terminal, North River, Manhattan.

A true copy of resolution adopted by the Board of Estimate on NOVEMBER 21, 1968.

/s/ Ruth W. Whaley

Secretary.

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02569

COPY OF
FEDERAL MARITIME COMMISSION
AGREEMENT NO. T-227A



AGREEMENT

This AGREEMENT, made as of 1969 by and among (i) the CITY OF NEW YORK (hereinafter called "the City"), acting by its Commissioner of the Department of Ports and Terminals of the Economic Development Administration, (ii) THE PORT OF NEW YORK AUTHORITY, (hereinafter called "the Port Authority"), acting by its Executive Director, and (iii) the members of a group of steamship operators and agents, conducting seagoing passenger vessel operations to and from the Port of New York, such members being those persons, firms and corporations whose signatures or the signatures of whose appropriate officers appear subjoined to this Agreement, and being hereinafter collectively called "the Carriers,"

WITNESSETH, That:

WHEREAS, the City and the Port Authority have undertaken the effectuation of a plan and project in order to provide a modern terminal on the Hudson River shore of Manhattan Island for the use of seagoing passenger vessels; and

WHEREAS, the Carriers are desirous of cooperating with the City and the Port Authority in the fulfillment of this project and in the operation of the terminal to be constructed;

NOW, THEREFORE, the City, the Port Authority and the Carriers agree with relation to the passenger vessel terminal project, as follows, the agreements constituting mutual and interdependent covenants:

1. The City will provide, subject to and in accordance with a formal agreement to be entered into between the City and the Port Authority, and hereinafter called "the Basic Agreement," the financing of the construction of the new passenger vessel terminal. The City shall also cancel any existing leases and permits under which any of the Carriers may be obligated to make future rental payments. Present deferred maintenance obligations, if any, will be resolved promptly as between the City and the Carriers and appropriate arrangements for cancellation of pier leases and parking area leases or permits will be completed at the same time, if possible. "Passenger vessel" as used herein shall be as defined in the Basic Agreement.

2. The Port Authority will in accordance with the Basic Agreement, diligently construct and upon completion, operate the new passenger vessel terminal. The Port Authority will use its best efforts to complete construction of the new passenger vessel terminal at a construction cost presently estimated at \$60,250,000, as rapidly and as economically as may be practicable. The Port Authority shall during the period of

construction, operate certain existing pier facilities on the Hudson River shore of Manhattan Island for passenger vessel terminal use. The new passenger vessel terminal as and when constructed is hereinafter called "the Permanent Terminal" and the piers to be operated during the period of construction are all hereinafter collectively called "the Interim Terminal." The City and the Port Authority will lend their best efforts to the employment of Piers 84 and 92 as part of the Permanent Terminal whenever it appears from scheduling that such additional capacity is required.

3. The Carriers undertake, from the date of commencement of the letting under the Basic Agreement, to operate all their passenger vessel service to and from the Port of New York, whether directly or by agents, contractors, charterers or in any other indirect manner, only to and from the Interim Terminal, except as may be required by existing agreements, copies of which will be provided to the Port Authority, and upon completion of construction, to and from the Permanent Terminal only. The Interim Terminal piers shall include present Piers 40, 84, 90, 92 and 97. Operation of the Interim Terminal facilities will include the operation of presently associated parking facilities. Moreover, so long as the Permanent Terminal is (i) actually being operated so that the consolidated passenger vessel operations of the Port of New York are being handled there and (ii) remains safe, sound, and of sufficient capacity to handle all such vessels serving or desiring to serve the Port of New York and their passengers comfortably, conveniently, and in a manner consistent with the standards of passenger vessel terminal operation in the major ports of the world, and includes physical changes adequate to meet the requirements of industry-wide technological developments, the Carriers shall not make use of any pier, dock, wharf, bulkhead or other terminal of any type within the Port of New York for passenger terminal operations; but this covenant shall remain in effect for no more than fifty years after the expiration of the original term of the letting of the Permanent Terminal. Use of other facilities under emergencies shall not be deemed a breach of this obligation. Emergencies shall include unforeseen berthing delays, or delays in berth, due to strikes, work stoppages, delays in connecting transportation services, weather, acts of God, war or governmental order, or other conditions similarly affecting vessel movements. Of the costs incurred by Carriers by reason of the usage of other facilities in New York in emergencies of such character as incapacitate the Interim or Permanent Terminal for use, or make its use unreasonably difficult, only such costs of dockage and wharfage as are in excess of the costs normally incurred by all or substantially all Carriers utilizing the Interim or Permanent Terminal will be apportioned among all the Carriers operating at the Interim or Permanent Terminal. Such excess costs may, at the option of the Port Authority be credited against any present or future

amount owed by the Carrier having incurred such excess costs or remitted to the Carrier directly. Violation of this covenant by any of the Carriers shall subject such Carrier to payment of liquidated damages in the amount of the gross revenues which would have been earned by the Interim or Permanent Terminal (as the case may be) except for such violation. Use of Piers 84 or 92 when no berth is available in the Permanent Terminal shall not be a violation.

4. The Carriers recognize that the Interim Terminal will be operated by the Port Authority in part through agency agreements to be entered into between certain of the Carriers and the Port Authority to cover maintenance and allied activities, and all of the said Carriers and the Port Authority will cooperate in the negotiation and completion of such agency agreements as may be required by them and the Port Authority for the control by the Port Authority of passenger vessel terminal operations.

5. (a) All Carriers shall operate at the Interim Terminal on a tariff basis without leases, agreements or other arrangements covering any fixed term or area and all Carriers shall pay to the Port Authority the tariff charges for dockage, wharfage and other services, all as set forth in tariffs to be promulgated and published by the Port Authority and filed with the Federal Maritime Commission.

(b) In addition to the dockage and wharfage charges set forth in paragraph 5(a), for Permanent Terminal operations, the Carriers will collect and pay to the Port Authority fees in amounts prescribed by the Port Authority (to be collected by the Carriers from passengers in connection with the sale of tickets involving transportation to or from the Port of New York). The Carriers understand that with respect to Permanent Terminal operations the Port Authority will, in addition, collect revenues from parking, visitors to the Permanent Terminal and shops and other facilities operated by others with the permission of the Port Authority, at the Permanent Terminal.

6. Tariff charges for the Interim Terminal shall be designated to discharge all expenses of the operation of the Interim Terminal, (including no more than \$1,821,451.75 annually on account of the City's rent), the operation and maintenance of such facilities, and the Port Authority's proper administrative and overhead costs properly allocable to such Interim Terminal operations.

7. The Carriers acknowledge that revenues required for the construction, operation and maintenance of the Permanent Terminal will include (i) payments by the Carriers directly related to passenger vessel operations and (ii) incidental charges paid by others, available to the Port Authority because of other services and activities, at the Permanent Terminal being the charges described in paragraph 5(b) hereof other than passenger fees. The Carriers accept that, according to forecasts and studies prepared by the Port Authority, approximately 9/11ths of the total annual revenues will be derived from sources related to passenger vessel operations and that these sources are the charges contained in paragraph 5(b) hereof. The Carriers acknowledge that the revenue from the Permanent Terminal must be structured to meet the rental payments required of the Port Authority under the Basic Agreement and the operations and maintenance costs of the facility. Refunding over the twenty-year term under the Basic Agreement of the original capital cost is the principal factor in the basic rental payable under the Basic Agreement. The City acknowledges that use after the twenty-year lease term will be charged for on a rental or tariff basis which recognizes and takes into account the fact that the original capital cost of the Permanent Terminal will have been fully recovered at the end of the said term of the Basic Agreement. The Port Authority will publish the dockage and wharfage tariffs and will set the passenger fees annually. In any year the revenue provided from the Permanent Terminal will depend upon the rates in the various tariffs specified in paragraph 5 hereof, the number of ships calling, and the number of passengers using the facility. For the first year of Permanent Terminal operation, the Carriers accept that the tariff shall without prejudice be calculated upon a requirement of revenue from these sources in the estimated amount of \$8,750,000, and on an assumed 700,000 passengers. The Port Authority shall, in determining revenue required for each succeeding year, increase or decrease tariffs taking into consideration the estimated number of passengers, the estimated change in operational and maintenance costs on account of generally recognized economic factors as well as the change, if any, arising from an estimated increase or decrease in the number of passengers handled. The results of the previous year shall be a factor in the determination. The surplus, if any, of receipts from all operations at the Permanent Terminal held by the Port Authority after payment of rental to the City and operating and maintenance costs (all as defined in the Basic Lease) shall, pursuant to Section 4B(b) of the Basic Lease, be held for distribution to the users of the Terminal, such surplus to be a factor towards reduction of subsequent tariff charges. The Carriers undertake to pay on the basis of their use of the facility, all reasonable tariff charges and passenger fees as determined by the Port Authority. In no event will the Port Authority be entitled to tariff increases or passenger fees which will produce a total return to the Port Authority in revenue from the passenger vessel operations as paid

by the Carriers in excess of the sum of Twenty Dollars and No Cents (\$20.00) multiplied by the number of passengers actually utilizing the Permanent Terminal in any year.

8. This Agreement shall be null, void and of no effect unless and until the same shall have been approved by the Federal Maritime Commission, as may be required by law.

9. The Port Authority and the City will make no arrangement with operators of passenger vessels other than the Carriers, granting to such other operators any economic or other provisions more advantageous thereto than those contained in this Agreement. All operators of passenger service shall be acceptable as signatories to this Agreement. No operator of passenger vessels shall be permitted to utilize the Interim or Permanent Terminal except as signatories of this Agreement, or under other contractual arrangement having the identical effect as this Agreement. All such users of the Terminal shall, to the extent practicable as determined by the Port Authority, be accorded equal treatment as to occupancy of space, access to berthing facilities and other operations at the Interim or Permanent Terminal.

10. No Commissioner, officer or employee of either the City or the Port Authority, and no officer or employee of any Carrier, shall be held personally liable under this Agreement.

IN WITNESS WHEREOF, the City of New York, The Port of New York Authority and the Carriers have executed these presents, five pages with additional pages for signatories, as of the date first above written.

ATTEST:

THE CITY OF NEW YORK

By

Commissioner of the Department
of Ports and Terminals of the
Economic Development Administra-
tion

(Seal)

ATTEST:

THE PORT OF NEW YORK AUTHORITY

By

Executive Director

(Seal)

02569

CARRIERS:

ATTEST:

(Title) _____

ATTEST:

(Title) _____

ATTEST:

(Title) _____

ATTEST:

(Title) _____

ATTEST:

(Title) _____

ATTEST:

(Title) _____

AKTIEBOLAGET SVENSKA AMERIKA LINIEN

By _____
(Title) _____
(Seal)

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

By _____
(Title) _____
(Seal)

CANADIAN PACIFIC STEAMSHIPS LIMITED

By _____
(Title) _____
(Seal)

CHANDRIS LTD.

By _____
(Title) _____
(Seal)

COMPAGNIE GENERALE TRANSATLANTIQUE

By _____
(Title) _____
(Seal)

COMPAGNIE GENOVESE D'ARMAMENTO S.p.A.

By _____
(Title) _____
(Seal)

02569

CARRIERS (Cont'd)

ATTEST:

(Title)_____

ATTEST:

(Title)_____

ATTEST:

(Title)_____

ATTEST:

(Title)_____

ATTEST:

(Title)_____

ATTEST:

(Title)_____

THE CUNARD STEAM-SHIP COMPANY LIMITED

By _____
(Title)_____ (Seal)

DEUTSCHE ATLANTIK LINIE

By _____
(Title)_____ (Seal)

GREEK LINE, INC.

By _____
(Title)_____ (Seal)

MOORE-MCCORMACK LINES, INC.

By _____
(Title)_____ (Seal)

HOLLAND-AMERICA LINE

By _____
(Title)_____ (Seal)

NORDDEUTSCHER LLOYD

By _____
(Title)_____ (Seal)

02569

CARRIERS (Cont'd)

ATTEST:

(Title) _____

ATTEST:

(Title) _____

ATTEST:

(Title) _____

ATTEST:

(Title) _____

ATTEST:

(Title) _____

ATTEST:

(Title) _____

DEN NORSKE AMERIKALINSE A/S

By _____
(Title) _____
(Seal)

SOCIETA per AZIONI DI NAVIGAZIONE
ITALIA

By _____
(Title) _____
(Seal)

HOME LINES INC.

By _____
(Title) _____
(Seal)

UNITED STATES LINES ,INC.

By _____
(Title) _____
(Seal)

UNIVERSAL CRUISE LINE INC.

By _____
(Title) _____
(Seal)

INCRES LINE AGENCY INC.

By _____
(Title) _____
(Seal)

FEDERAL MARITIME COMMISSION
AGREEMENTS NO. T-2271 AND T-2272

ORDER OF APPROVAL

Two agreements (T-2271 and T-2272) have been filed with the Commission for approval pursuant to section 15, Shipping Act, 1916. Agreement No. T-2271, between the City of New York (City) and the Port of New York Authority (Authority), is a passenger terminal lease providing for construction and operation of a new consolidated steamship passenger terminal in New York. The Authority will construct the proposed new terminal on certain waterfront property on Manhattan Island at an estimated cost in excess of \$60 million. Certain interim facilities will be used during construction of the new terminal. All passenger lines using the facility will be assessed dockage, wharfage and fees for other services to be set forth in a tariff of the Authority, which will be applied on a uniform basis. The City and Authority agree to take all possible measures to assure that future passenger vessel operations at New York will be conducted only through the new terminal. The City is cancelling existing leases and both the City and Authority agree not to promote, finance, establish, construct, operate or maintain any pier, wharf, bulkhead, dock, terminal or other facilities for the accommodation of passenger vessels, or authorize

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any other person to do so. Both agree not to issue work permits, construction approval or consent for construction of a passenger terminal anywhere in their respective jurisdictions.

Agreement No. T-2272, between the City, Authority and several ^{1/} passenger vessel operators serving the Port of New York (Carriers), provides for arrangements for interim terminal facilities, and for use of the new terminal facilities when completed. Carriers signing the agreement will use interim facilities and then the new terminal as set forth in Agreement No. T-2271 for an initial term of 20 years plus an additional term of 50 years. Carriers agree that all of their New York passenger operations will be conducted at the interim terminal and the new terminal. The City and Authority will make no arrangements with other passenger lines which would grant any economic or other provisions more advantageous than those contained in the agreement. All passenger lines will be accepted as signatories to the agreement and no line will be permitted to use the interim or new terminal except as a signatory to the agreement or under other contractual arrangement having the identical effect as the

1/ Compagnie Generale Transatlantique (French Line), The Cunard Steam-Ship Company Limited, United States Lines, Inc., Moore-McCormack Lines, Incorporated, Norwegian American Line, and Swedish American Line.

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agreement. The Authority agrees that in no event will it exact revenue from Carriers exceeding \$20.00 per passenger average per year.

Notice of the filing of the agreements was published in the Federal Register on February 28, 1969. A protest against approval of the agreements was filed by Marine Space Enclosures, Inc. (protestant). The protest was concurred in by American Dock Company of Staten Island, New York, a company affiliated with protestant. Protestant urges that the agreements are contrary to sections 15 and 16 First, detrimental to the commerce of the United States and contrary to the public interest, and should be disapproved or set down for an evidentiary hearing. Comments were received from other interested parties ^{2/} urging that the agreements are in the public interest and should be approved by the Commission. Certain of these parties urge that the agreement be approved without a hearing by the Federal Maritime Commission.

The Commission has reviewed the agreements, protests and replies and other comments and is of the opinion that the agreements should be approved. Proponents have demonstrated a transportation need for the agreements and it would appear that the agreements are not unjustly discriminatory or unfair or detrimental to the commerce

2/ New York Chamber of Commerce; the New York City Council on Port Development and Promotion, comprised of Industry and Labor representatives; The Cunard Steam-Ship Company Limited; French Line; and the International Longshoremen's Association, A.F.L. - C.I.O.

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industry, and labor interests that ocean passenger service at New York has suffered from these inadequacies. Modern and efficient passenger facilities for New York are essential if ocean passenger vessels are to continue service at that Port.

This project has been the subject of three public hearings in New York. Virtually every entity representing the public and maritime interests at New York have supported this proposal and these agreements. Representatives of passenger lines, maritime labor, the Department of Transportation, the Bureau of Customs and other maritime interests strongly supported construction of the proposed new passenger terminal. No passenger lines appeared in opposition. The only opposition was from protestant, a real estate developer, who presented an architectural "rendering" of a project which would include passenger terminal facilities. Protestant states that it has plans to construct a major complex of dwellings, hotel and office units, built over subaqueous parking, and ancillary facilities on the waterfront of the City of New York and that such plans include construction of an advanced terminal for passenger lines. The proposals of protestant were rejected by officials of the City of New York.

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of the United States and are not contrary to the public interest.

The only protestants against approval of these agreements are Marine Space Enclosures, Inc., the proponent of an alternative passenger terminal plan, and American Dock Company, an affiliate of Marine Space Enclosures, which owns five piers on Staten Island which we have reason to believe are being planned for cargo operations. The particular interests of the protestants appears to be indirect and remote.

New passenger facilities are clearly needed at the Port of New York. Practically all possible sites for such facilities and other passenger terminal property in New York are owned by the City. The Authority is expert in the field of terminal construction planning and operation. It is only logical that if a new passenger terminal is to be provided at the Port of New York, it would in all probability be provided by either the City, or the Authority, or as in the case in Agreement No. T-2271, both parties, through use of public funds. In the past no passenger terminal facilities in New York have been provided by private interests.

Passenger facilities at the Port of New York are sub-standard, dilapidated, run-down, inefficient and unattractive. For years it has been recognized by governmental bodies, the steamship

We are persuaded that these factors demonstrate that the agreements encompass sufficient transportation benefits in the public interest to warrant their approval. In fact, the transportation need is so clear we consider it essential that the project be permitted to be initiated as soon as possible.

Agreements T-2271 and T-2272 are unique, and involve relationships and obligations which in their present form have not heretofore been subject to Commission consideration by virtue of its authority under section 15 of the Shipping Act, 1916. Consequently, the Commission reminds the parties to the agreements of the obligations which they undertake among themselves and toward the public interest. Commission approval of an agreement under section 15 grants the agreements and its parties anti-trust immunity for activity which otherwise would be subject to scrutiny and possible other action under our federal anti-trust laws. This result warrants special mention here, not only because of the unique nature of the agreements, but because of certain clauses and provisions in the agreements which are of especially anti-competitive character and effect. Standing alone this does not require disapproval of the agreements or portions thereof. It does require, however, that the Commission emphasize its jurisdiction over agreements once they receive Commission approval.

Under section 15 of the Shipping Act, 1916, the Commission retains full power of surveillance over approved agreements as a

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condition of approval. The Commission, after approval, retains the power to "cancel or modify any agreement, or any modification. . . thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair. . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act, 1916. . ."

In addition to this continuing surveillance, the Commission's jurisdiction over section 15 agreements includes the settlement of disputes arising out of the operation and implementation of such agreements. Any aggrieved party, whether or not a party to the agreements, may avail himself of the formal or informal procedures established by this Commission for the hearing of disputes, complaints or other disagreements as to the effect, operation or implementation of section 15 agreements.

So that the Commission may be able to properly exercise its continuing authority with regard to approved section 15 agreements, we require complete information as to their operation. This is especially true with agreements such as T-2271 and T-2272 which contain particularly anti-competitive provisions. Consequently, the Commission will require the parties to the subject agreements to keep the Commission informed of the internal and external

operations of the agreements. The information will be demanded as the Commission deems necessary or on a periodic basis. It will be submitted through written reports, the submission of specified data or operating records, or obtained by investigation by the Commission or in any other manner within the present or future authority of the Commission.

Tariffs covering dockage, wharfage, and other terminal service fees applicable at the interim and new passenger terminals shall be filed with the Commission. Such tariffs and any changes thereto shall be filed on at least 30 days advance notice, unless the Commission for good cause shown shall grant special permission for changes on less than thirty days.

IT IS THEREFORE ORDERED, that agreements No. T-2271 and T-2272 are hereby approved pursuant to section 15 of the Shipping Act, 1916. By the Commission, April 7, 1969.



Thomas Lisi
Secretary

(SEAL)

7/12/69

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RECEIVED

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FEDERAL MARITIME COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL MARITIME COMMISSION
In the Matter of
FMC Agreements Nos. T-2271, T-2272

APPLICATION FOR STAY OF COMMISSION'S
ORDER PENDING REVIEW IN THE COURT OF
APPEALS.

Comes now Marine Space Enclosures, Inc., Petitioner in the above matter, and pursuant to F.R.A.P. Rule 18, moves the Commission to stay, pending review in the U.S. Court of Appeals for the District of Columbia, so much of its order herein, dated April 10, 1969, as purports to approve

(1) Paragraph No. 31(a), (b) and (c) of Agreement No. T-2271.

(2) Paragraphs 3 and 9 of Agreement No. T-2272.
and as grounds therefor, shows:

If these clauses go into effect forthwith, all carriers will be effectually tied to the Port Authority and the City of New York; and will be totally unavailable to the solicitation of a competitive terminal such as the Protestant contemplates. Moreover, the City will have assumed the contractual duty to prevent all competitive terminals from coming into

existence and from operating within New York, whether on City or private pier property. Protestant and its associates will then be unable to organize and procure the financing and engineering facilities and resources, and the leases, rentals and other use arrangements necessary for its project. The elaborate and closely interrelated and intermeshed arrangements necessary for so large and complex a project cannot be assembled and preserved in the face of a formal order of this Commission legalizing total foreclosure of the right of entry into the terminal field, which is an integral part of Protestant's undertaking.

We urge the Commission, which obviously has serious doubts as to the legality of these exclusionary and tying clauses, to let the burden of litigation rest where it properly belongs, on their proponents, rather than on those who under normal conditions would be entitled to the protection of the laws forbidding the destruction of all existing and potential competition.

This motion does not seek to arrest construction of the proposed City terminal or to substitute Protestant's plan for that of the City. It is addressed solely to the clauses destroying competition by excluding all but the City terminal and tying the carriers exclusively to that terminal for 73 years on threat of denial of service.

Respectfully submitted,

Joseph A. Klausner

Joseph A. Klausner
Attorney for
Marine Space Enclosures, Inc.
1028 Connecticut Avenue
Washington, D. C. 20036

April 10, 1969

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing first class mail, postage prepaid, a copy to each such party.

Joseph A. Klausner

Joseph A. Klausner

Washington, D. C.

April 10, 1969

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~~129A~~

April 11, 1969

Joseph A. Klausner, Esq.
1028 Connecticut Avenue, N. W.
Washington, D. C. 20036

Dear Mr. Klausner:

Reference is made to your application of April 10, 1969 to stay the Commission's order approving Federal Maritime Commission Agreements Nos. T-2271 and T-2272.

This is to advise you that the Commission has considered your application and has denied it.

Very truly yours,

(Sgd.) THOMAS LISI

Thomas Lisi
Secretary

cc: James M. Henderson, Esq.
La Roe, Winn & Moerman
1511 K Street, N. W.
Washington, D. C. 20005

APPENDIX

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FEDMARCOM WSH

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FEDERAL MARITIME COMMISSION

WASHINGTON

THE UNDERSIGNED WHO WOULD BE MAJOR USERS OF THE CONSOLIDATED
PIER TERMINAL IN NEWYORK STRONGLY FEEL THAT FURTHER DISCUSSIONS
ARE NECESSARY REGARDING THE PROJECT IN VIEW OF CHANGED COST
PICTURE AND UNRESOLVED APPORTIONMENT OF EXPENSES AS WELL AS
IMPOSSIBILITY TO CHOOSE ALTERNATE DOCKING FACILITIES IN NEWYORK
STOP WE WOULD BE PREPARED TO MEET WITH YOU TO EXPAND OUR VIEWS
AND MEANWHILE WE THANK YOU FOR THE CONSIDERATION GIVEN TO THE
CONTENTS OF THIS CABLE

CANADIAN PACIFIC STEAMSHIP GREEK LINE HOME LINE CHANDRIS
LINE INCHESLINE NORTH GERMAN LLOYD UNIVERSAL CRUISE LINE

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FEDMARCOM WSH

*Rec'd 4-25-69
EER*

FEDERAL MARITIME COMMISSION

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RE YOUR TELEGRAM RECEIVED APRIL 25, 1969 CONCERNING PASSENGER
TERMINAL PROJECT AT NEW YORK. HAVE HAD PRELIMINARY DISCUSSION WITH
MR. VASILIADES OF CREEK LINE. WE THINK THAT THE MEETING YOU
REQUEST ON THIS MATTER SHOULD BE HELD AT THE EARLIEST POSSIBLE
DATE. SUGGEST WEDNESDAY, APRIL 30, 2:00 P.M., IN ROOM 111, FMC
OFFICES AT 1405 I STREET, N.W. WE SUGGEST A REPRESENTATIVE OF
EACH LINE OR A SPOKESMAN FOR THE SEVERAL LINES. IF YOU HAVE
ANY QUESTIONS PLEASE CONTACT UNDERSIGNED AT AREA CODE 202,
382-3031.

Leroy F. Fuller

Leroy F. Fuller, Director
Bureau of Domestic Regulation

382-3031

4-28-69 2:00 PM

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FEDERAL MARITIME COMMISSION

PEARC

MR. J. J. TRAINOS
CANADIAN PACIFIC STEAMSHIP
581 FIFTH AVENUE
NEW YORK, NEW YORK 10007

MR. MARIO E. FUSCO
UNIVERSAL CRUISE LINE
380 LEXINGTON AVENUE
NEW YORK, NEW YORK

MR. VASILIAPODIS
GRSEK LINE
32 PEARL STREET
NEW YORK, NEW YORK 10004

MR. MARIO F. VESPA
HOME LINE
42 BROADWAY
NEW YORK, NEW YORK 10004

MR. KAPLANIDES
CEANORIS LINE
17 BATTERY PLACE
NEW YORK, NEW YORK 10004

MR. HANSEN
INCRES LINE
277 PARK AVENUE
NEW YORK, NEW YORK 10017

MR. W. A. HAGEL
NORTH OCEAN LLOYD
666 FIFTH AVENUE
NEW YORK, NEW YORK 10019

Leroy F. Fuller, Director
Bureau of Domestic Regulation

382-3031

4-28-59 2:00 P.M.

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WILL START OVER



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TLX073 (53)SHA287
SY 282214 TG PDS ZG NEW YORK NY 30 139P EDT
LEROY F FULLER, DIRECTOR, BUREAU OF DOMESTIC REGULATION

FEDERAL MARITIME COMMISSION WASHDC
YOUR TELEGRAM DATED MAY 29 CONCERNING MEETING 2:00 P.M. WEDNESDAY
APRIL 30 AT WASHINGTON RE NEW PASSENGER TERMINAL PROJECT AT
NEW YORK STOP UNDERSTAND YOU HAVE HAD CONVERSATION TODAY WITH
MR. VASSILIADIS OF GREEK LINE IN WHICH HE EXPRESSED INABILITY OF
UNDERSIGNED MEET WITH YOU STOP

IN VIEW NECESSITY NEW YORK LINES MEET PRIOR THERETO
AND OUT OF TOWN ABSENCES OF SEVERAL MEMBERS SHOULD LIKE SUGGEST
MEETING WITH FEDERAL MARITIME COMMISSION AT 2:00 P.M. WEDNESDAY
MAY 14 AT PNC OFFICE 42 BROADWAY NEW YORK CITY STOP PLEASE
CONFIRM IF SUCH ACCEPTABLE

CANADIAN PACIFIC STEAMSHIPS GREEK LINE HOME LINE CHANDRIS LINE
INCREIS LINES NORTH GERMAN LLOYD

29 2:55 30 2:57 14 15: 42
355P EDT +
FEDMARCON WSH

FEDERAL MARITIME COMMISSION
AGREEMENTS NO. T-2271 and T-2272


STIPULATION OF PROPONENTS

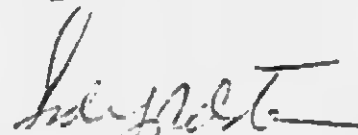
The City of New York and The Port of New York Authority, upon the record before the Federal Maritime Commission in connection with FMC Agreements Nos. T-2271 and T-2272, hereby stipulate and agree, in the interest of the maximum possible protection of the public interest both in regard to the effectuation of a consolidated passenger ship terminal in the Port of New York and in regard to the possible minimization of restrictions on free competition that:

1. The intervenors will resubmit Agreements Nos. T-2271 and T-2272 to the Federal Maritime Commission for review pursuant to Section 15 of the Shipping Act of 1916 at least six months prior to the expiration of the 25-year original term of the letting under Agreement No. T-2271;
2. To serve the same purposes, the intervenors agree to resubmit the said agreements for Section 15 review prior to the expiration of the original term of the letting under Agreement No. T-2271 if at such earlier time the capital cost of constructing the consolidated ship terminal in the Port of New York has been fully amortized both as to principal and interest;
3. The continuance of provisions requiring all carriers who sign Agreement T-2272 to use the consolidated ship passenger terminal exclusively, but on a Tariff basis, for their Port of New York business is essential in order to permit amortization of the capital cost of providing the terminal and as well to meet operating, maintenance and future rehabilitation costs. The amortization period is defined in Agreement T-2271 as extending for no more than the original term of the letting and it is, therefore, appropriate in the public interest to require exclusive use of the facility during that period. The facts and circumstances

which will exist after that period cannot be estimated or predicted with sufficient precision at this time to identify the period beyond the original term during which the other costs would require carrier commitments to exclusive use of the facility. It is, therefore, deemed appropriate by the proponents that the agreements be submitted to the Federal Maritime Commission at or about the time that the original capital cost has been amortized in order to permit informed review and precise identification of the additional period for continuance of the said exclusive commitment; and

4. It is understood that the within agreement to resubmit the agreements as aforesaid is not intended, nor will it be claimed to have the effect of detracting from the continuing powers of the Federal Maritime Commission with respect to agreements subject to Section 15.


CITY OF NEW YORK
By: J. Lee Rankin
Corporation Counsel


THE PORT OF NEW YORK AUTHORITY
By: Sidney Goldstein
General Counsel

May 8, 1969

FEDERAL MARITIME COMMISSION
AGREEMENTS NOS. T-2271 and T-2272
SUPPLEMENT TO ORDER OF APPROVAL

By order dated April 7, 1969 the Commission approved pursuant to section 15 of the Shipping Act, 1916, Agreements Nos. T-2271 and T-2272 under which the City of New York, the Port of New York Authority and the passenger ship carriers serving the Port of New York have arranged for the construction and operation of a new consolidated steamship passenger terminal in the Port of New York. In our order of approval, we noted that we would continue close supervision over the agreements because of the anti-competitive features therein. The Commission's order of approval of these agreements is presently being reviewed by the United States Court of Appeals for the District of Columbia Circuit.

On April 25, 1969, we received a telegram from seven passenger carriers, primarily cruise lines, who represent that they are major users of the facilities covered in Agreement No. T-2271. The telegram states that the carriers:

strongly feel that further discussions are necessary regarding the project in view of the changing cost picture and unresolved apportionment of expenses as well as impossibility to choose alternate docking facilities in New York.

The carriers requested a meeting in order to expand their views on this matter. The Commission suggested an early meeting on this matter, but the carriers due to absence of officials of several of the carriers were unable to meet until May 14, 1969. Inquiry by the Commission's staff indicates no desire on the carriers' part to consider this as a formal protest.

On April 29, 1969 the New York Port Authority filed tariff pages covering rates and charges applicable for the interim terminal facilities to be effective not earlier than June 1, 1969.

On May 8, 1969 a document entitled "Stipulation of Proponents" was received. Contained in this document was a stipulation between the City of New York and the New York Port Authority entered into at the suggestion of the Department of Justice to resubmit the agreements for Commission review at least six months prior to the termination of the original lease term of 23 years.

The aforementioned information, in light of our continuing jurisdiction, necessarily requires further comment on our part, however, in no way does this affect the Commission's original order of April 7.

The cruise lines express concern over the "impossibility to choose alternate docking facilities". This again brings to light the question of the exclusivity provisions of the agreement, as does Item 870 of the tariff requiring carriers using the interim facilities to comply with the provisions of Agreement No. T-2272.

In our earlier order we noted our concern over the anticompetitive features of the agreements. Of particular concern was the provision of Agreement No. T-2272 allowing for a possible exclusive use of the facility for 73 years. The principal objective of this provision is to insure recapture of the original capital costs. Of this 73-year period of exclusive patronage, the first 23 years are necessary for the repayment of capital costs through the amortization of the bond issue. This initial period is certainly necessary at least to insure the threshold success of the project.

In our earlier order, we approved the agreements and thus the anti-competitive provisions contained therein because the "[p]roponents have demonstrated a transportation need for the agreements". It is clear that the passenger ship carriers are unwilling, and perhaps unable, to enter into long-term fixed leases providing for rentals adequate to permit the City or the Port Authority to finance, build and operate a badly-needed new passenger ship terminal in the Port of New York. The passenger ship traffic has declined on transatlantic runs and there is little prospect for improvement of that portion of the passenger ship business. The cruise traffic is growing but that business has not become sufficiently stabilized to permit cruise carriers to undertake long-term lease commitments. Lacking firm leases from the passenger ship carriers, the only possible self-supporting basis on which the City and the Port Authority could proceed to finance and to build the new terminal is that the carriers be required to use the new terminal to the exclusion of other properties in the City of New York for all of their Port of New York traffic. In light of the policy of the City and the Port Authority that such terminal should be self-supporting, it is logical for the City and the Port Authority to require carrier commitments for exclusive use of the new terminal on a tariff basis in order for the public agencies to have some assurance that they will recapture capital and operating costs. Although we were somewhat troubled by the necessity of the exclusivity provisions beyond this period we were not unmindful of the fact that the agreements in question are lawful only and so long as approved by us under section 15. The proponents of the agreements have eased our concern somewhat by their submission of a stipulation to resubmit the agreements at the end of the amortization period. In view of this stipulation the Commission will at that point review the agreements in light of

current circumstances and decide anew whether any continued anticompetitive agreements would be in the public interest. This, we believe, will insure the protection of the public interest and it also demonstrates further the desire and objective of the proponents to serve the interests of the commerce of the Port of New York without imposing any unnecessary burden on the passenger ship carriers.

We again remind all concerned parties of our continuing surveillance over the agreements and the tariff in question and the availability of informal and formal procedures for the settlement of disputes arising therefrom.

By the Commission, May 12, 1969

Thomas Risi
Secretary

WESTERN UNION

STRAIGHT MESSAGE

MAY 12, 1969

FEDERAL MARITIME COMMISSION
1405 I STREET, N.W.
WASHINGTON, D. C.

FURTHER TO MY TELEGRAM OF THIS DATE PROTESTING SO-CALLED
STIPULATION OF "INTERVENORS", I CALL YOUR ATTENTION TO THE
FACT THAT THEY ARE ONLY TWO PARTIES TO T-2272 AND THAT
ACCORDING TO THE COMMISSION'S ORIGINAL ORDER SIX LINES HAD
ALSO SIGNED. THIS FURTHER ILLUSTRATES CARELESS APPROACH TO
PROCEDURE UNDER SECTION 15 AND INVALIDITY OF COMMISSION'S
SUPPLEMENTARY ACTION OF MAY 12, 1969.

Respectfully submitted,

Joseph A. Klausner
Counsel for
Marine Space Enclosures, Inc.
1028 Connecticut Avenue, N.W.
Washington, D. C.

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WESTERN UNION

STRAIGHT MESSAGE

MAY 12, 1969

FEDERAL MARITIME COMMISSION
1405 I STREET, N.W.
WASHINGTON, D. C.

YOU HAVE TODAY FURNISHED ME A COPY OF A SUPPLEMENT TO THE ORDER OF APPROVAL OF AGREEMENTS T-2271 AND T-2272, TOGETHER WITH COPY OF STIPULATION BY THE CITY OF NEW AND THE PORT OF NEW YORK AUTHORITY DATED MAY 8, 1969. NOTWITHSTANDING THE APPEARANCE OF MY NAME AS RECIPIENT OF SAID STIPULATION, I AT NO TIME RECEIVED THE SAME UNTIL YOUR GENERAL COUNSEL DELIVERED A COPY THEREOF ON THIS DATE.

THIS STIPULATION CLEARLY REPRESENTS A MODIFICATION OF THE SAID AGREEMENTS WITHIN THE MEANING OF SECTION 15, SHIPPING ACT, 1916, OF WHICH NOTICE WAS REQUIRED BEFORE THE COMMISSION COULD APPROVE IT. MARINE SPACE ENCLOSURES, INC., STRONGLY PROTESTS BOTH THIS MODIFICATION AND THE COMMISSION'S EX PARTE PROCEDURE WITHOUT NOTICE AND WITHOUT HEARING. SUCH ACTION IS ENTIRELY BEYOND THE COMMISSION'S AUTHORITY UNDER SECTION 15, AS WELL AS A BREACH OF THE ADMINISTRATIVE PROCEDURE ACT.

YOUR SUPPLEMENTAL ORDER RECITES THE EXISTENCE OF A STRONG OBJECTION FROM NO FEWER THAN SEVEN PASSENGER CARRIERS WHICH ARE AFFECTED BY THESE AGREEMENTS. THIS IS ANOTHER EVIDENCE OF THE COMMISSION'S HASTY DISREGARD OF IMPORTANT INTERESTS AFFECTED, AND WE SUBMIT THAT THE FLIMSY PATCHWORK TO WHICH IT HAS BEEN NECESSARY TO RESORT IN ORDER TO OBSCURE THE UNDERLYING AND FATAL WEAKNESSES OF THESE AGREEMENTS IS THE BEST EVIDENCE OF THE IMPROPRIETY FROM THE OUTSET OF DISPENSING WITH ORDERLY HEARING PROCEDURE. ALL THE MATTER RECITED FROM THE BOTTOM OF PAGE TWO THROUGH THE REMAINDER OF THE ORDER IS BASED ON NO INFORMATION OF RECORD, AND AS IT HAS NO FOUNDATION, MUST BE DRAWN FROM EX PARTE COMMUNICATIONS WHICH HAVE NOT BEEN SUBJECTED TO ANY EVIDENTIARY TESTS. (EXACTLY THE SAME BLUNDER WAS COMMITTED IN THE ORIGINAL ORDER IN RELYING UPON SUPPOSED PUBLIC HEARINGS HELD IN NEW YORK AND OF WHICH THE COMMISSION DID NOT EVEN HAVE A TRANSCRIPT.) IN FACT, THEY HAVE NOT EVEN BEEN SERVED ON THE PROTESTANTS. THEY ARE, MOREOVER, NOT MERELY WITHOUT FOUNDATION BUT CLEARLY ERRONEOUS. THE SUPPLEMENTAL ORDER APPLAUDS PROPONENTS OF THE AGREEMENTS FOR DESIRING TO SERVE THE INTERESTS OF THE PORT OF NEW YORK WITHOUT IMPOSING ANY UNNECESSARY BURDEN ON THE CARRIERS: WHAT THE AMENDMENT REALLY SHOWS, WITH GREAT RESPECT, IS THEIR ADMISSION OF OVERREACHING IN THE FIRST INSTANCE AND THEIR FEAR, AS EXPRESSED IN THEIR COVERING LETTER, OF THE FURTHER ACTION OF THE DEPARTMENT OF JUSTICE.

WE STRONGLY REPRESENT TO THE COMMISSION THAT FAIR DEALING ON THE FACE OF THE MOST OBVIOUSLY WIDESPREAD RESISTANCE TO

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THESE AGREEMENTS REQUIRES RESORT TO THE ORDERLY PROCESSES OF HEARING. AT THE VERY LEAST WE FORMALLY REQUEST WITHDRAWAL OF THE SUPPLEMENTAL ORDER ENTIRELY UNTIL WE HAVE HAD A REASONABLE OPPORTUNITY TO FILE A PROTEST AND TO ARGUE IN OPPOSITION.

RESPECTFULLY SUBMITTED,

JOSEPH A. KLAUSNER
COUNSEL FOR
MARINE SPACE ENCLOSURES, INC.
1028 CONNECTICUT AVENUE, N.W.
WASHINGTON, D. C.

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,936

MARINE SPACE ENCLOSURES, INC.)

Petitioner

v.

FEDERAL MARITIME COMMISSION
and
UNITED STATES OF AMERICA

Respondents)

PETITION FOR REVIEW

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 25 1969

Nathan J. Paulson
CLERK

APPENDIX TO PETITIONER'S BRIEF

- EXHIBIT 1. FMC AGREEMENT T-2271
- EXHIBIT 2. FMC AGREEMENT T-2272
- EXHIBIT 3. PETITIONER'S PROTEST DATED MARCH 11, 1969
- EXHIBIT 4. RESPONSE OF NEW YORK CITY AND THE PORT OF
NEW YORK AUTHORITY DATED MARCH 18, 1969,
WITH TWO ATTACHMENTS
- EXHIBIT 5. TELEGRAM OF PETITIONER TO FEDERAL MARITIME
COMMISSION DATED MARCH 17, 1969
- EXHIBIT 6. SUPPLEMENTARY RESPONSE OF THE PORT OF NEW
YORK AUTHORITY DATED MARCH 21, 1969,
WITH THREE ATTACHMENTS
- EXHIBIT 7. REPLY OF PETITIONER DATED MARCH 27, 1969,
TO SUPPLEMENTARY RESPONSE OF THE PORT
OF NEW YORK AUTHORITY
- EXHIBIT 8. PETITIONER'S COMMUNICATION DATED APRIL 8,
1969

EXHIBIT 1

PVTL

T-2271

Exhibit 1

PASSENGER VESSEL TERMINAL

LEASE:

CITY OF NEW YORK

TO

THE PORT OF NEW YORK AUTHORITY

1968

LEASE INDEX

THE PORT OF NEW YORK AUTHORITY

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Permanent Premises

Exhibit 1

Precedes index

Interim Premises

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Schedule of Rental Payments

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Precedes index

PASSENGER TERMINAL LEASE

AGREEMENT, made this 17th day of January, 1969 by and between THE CITY OF NEW YORK, (hereinafter called "the City") a municipal corporation of the State of New York, with its principal office at the City Hall, in the Borough of Manhattan, City, County and State of New York, acting by its Commissioner of the Department of Ports and Terminals of the Economic Development Administration, and THE PORT OF NEW YORK AUTHORITY, (hereinafter called "the Port Authority") a body corporate and politic, created by Compact between the States of New York and New Jersey with the consent of the Congress of the United States of America, with its office at 111 Eighth Avenue, in the Borough of Manhattan, City, County and State of New York;

WHEREAS, by Chapter Six Hundred Thirty-one of the Laws of New York, 1947, and Chapter Forty-four of the Laws of New Jersey, 1947, as amended and now in force, the said two States have authorized any municipality within the Port of New York District (hereinafter called "the Port District") to cooperate with the Port Authority in the development of marine terminals and, to that end, have empowered any municipality in the Port District to consent to the use by the Port Authority of any marine terminal owned by such municipality or of any real and personal property owned by it, and as an incident to such consent, to grant, convey, lease or otherwise transfer to the Port Authority any such property upon such terms as may be determined by the Port Authority and such municipality; and

WHEREAS, after detailed study and consideration of the problem and project by the Port Authority, the City and the Port Authority have mutually agreed to cooperate in the planning, construction and operation of a modern marine terminal for water-borne passenger travel incorporating facilities for superior comfort, convenience and efficiency, and for serving the objective of consolidating at such terminal the operations of the various passenger lines serving the City and the Port District; and have agreed that effectuation of such a project is and will be in the public interest; and

WHEREAS, the plans for the consolidated passenger ship terminal have been formulated in keeping with the City's comprehensive plan for development of the area east of the terminal's site; and

WHEREAS, the City, by resolution duly adopted by its Board of Estimate on the 21 day of November, 1968 (Cal. No. 9-A), a copy of which is annexed to and made

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a part of this Agreement, authorized the execution and delivery of this Agreement; and

WHEREAS, by resolution duly adopted by its Board of Commissioners on the 14th day of November, 1968, a copy of which is annexed to and made a part of this Agreement, the Port Authority authorized the execution and delivery of this Agreement;

NOW, THEREFORE, the City and the Port Authority hereby mutually undertake, promise and agree, each for itself and for its successors and assigns, as follows:

1. LETTING

The City hereby demises and leases to the Port Authority, and the Port Authority hereby takes and hires from the City for marine terminal purposes and for purposes consistent or incidental thereto and for no other purpose except with the prior written approval of the said Commissioner:

(a) ALL THOSE CERTAIN pieces and parcels of land, and lands under water, together with the buildings, structures and improvements, if any, thereon or therein, now or hereafter constructed, situate in the Borough of Manhattan, in the City, County and State of New York, bounded and described as lying at or near the foot of West 45th to West 51st Streets, extending from the bulkhead wall 1100 feet more or less to the U.S. Pierhead Line, all as shown in stipple on the print hereto attached, hereby made a part hereof and marked "Exhibit 1"; the foregoing being hereinafter collectively called "the permanent premises". The City will not itself construct or permit any other to construct any structure whatsoever in the following areas covered by water: (i) the area bounded by the southerly line of the permanent premises and a line drawn parallel thereto and one hundred eighty (180) more or less feet to the south thereof, and (ii) the area bounded by the northerly line of the permanent premises and a line drawn parallel thereto and one hundred eighty-seven and one-half (187.5) more or less feet north thereof. Structures existing on the area which constitutes the permanent premises may be used by the Port Authority as hereinafter provided but shall not be considered part of the permanent premises unless physically remaining at the date of final completion of the marine terminal.

(b) All those certain pieces and parcels of lands and lands under water together with the buildings, structures and improvements, if any, therein or thereon, now or hereafter constructed situate in the Borough of Manhattan, in the City, County and State of New York bounded and described as follows:

(i) Pier 40, North River

Located at the Foot of West Houston Street, in the area bounded and described as follows: Beginning at the intersection of the existing bulkhead with a line distant 290 feet southerly from and parallel with the southerly line of Pier 42, North River, thence westwardly parallel with said Pier 42, North River, for a distance of 807 feet more or less; thence southwardly and at right angles to the last mentioned course a distance of 755 feet more or less; thence westwardly parallel with said Pier 42 to the United States Pierhead Line, thence southwardly along said United States Pierhead Line a distance of 55 feet; thence eastwardly parallel with said Pier 42 to the said existing bulkhead; thence northwardly along said bulkhead to the point or place of beginning, all as shown in crosshatch on the print attached hereto, made a part hereof, together with the use of lands under water as shown in stipple on said print.

(ii) Pier 84, North River

Located at the foot of West 44th Street, approximately 1000 ft. long on the north side and 699 ft. long on the south side and 135 ft. wide with the structures thereon, together with the upland area (approximately 25,185 sq. ft.) on the south side of the pier all as shown in stipple on print attached hereto and made a part hereof, together with the use of lands under water as shown in stipple on said print.

(iii) Pier 92, North River

Located at the foot of West 52nd St., approximately 775 ft. long on the north side and 1075 ft. long on the south side and 124 ft. wide with the structures thereon, all as shown outlined in crosshatch on print attached hereto and made a part hereof, together with the use of lands under water as shown in stipple on said print.

(iv) Pier 97, North River

Located at the foot of West 57th St., approximately 700 ft. long and 110 ft. wide with the structures thereon, together with the bulkhead from the center line of slip between Piers 96 and 97, North River, to the center line of slip between Piers 97 and 98, North River, together with the bulkhead sheds approximately 50 ft. in width immediately inshore of said bulkhead and together with 4978 square feet of upland (52 feet in width) inshore of the northerly bulkhead extending to the southerly side of Pier 98 all as shown in crosshatch on print attached hereto and made a part hereof, together with the use of lands under water as shown in stipple on the said print.

All as shown on the print hereto attached, hereby made a part hereof and marked "Exhibit 2", being hereinafter collectively called "the interim premises," and to be used for the activities and operations being conducted there at present.

(c) The permanent premises and the interim premises are hereinafter collectively called "the premises".

2. DEFINITIONS

As used in this Agreement:

(a) "The marine terminal" or "the facility" means the entire development of the permanent premises consisting of land, lands under water and piers, bulkheads, docks, slips, buildings, structures, landscaping and improvements necessary or convenient for the handling, accommodation and servicing of seagoing vessels primarily engaged in passenger service, and the handling, accommodation and servicing of passengers, mail, visitors and cargo, and other activity incidental to such operations.

(b) "Commissioner" or "Commissioner of the Department of Ports and Terminals of the Economic Development Administration" means the officer or agent of the City who for the time being shall be exercising functions the same as or equivalent to those now exercised by the Commissioner of the Department of Ports and Terminals of the Economic Development Administration.

(c) "Passenger vessel" means a seagoing vessel, other than one in military or naval service, engaged primarily in carrying more than three hundred twenty (320) persons as passengers, and loading or unloading not more than one thousand (1,000) long tons of cargo, on voyages extending for not less than twenty-four (24) hours, and actually operated on voyages of at least such duration, from or to the Port of New York, or other vessels, calls of which are recommended by the Port Authority for handling at the marine terminal and approved in writing by the Commissioner.

(d) "Construction cost" and "operating and maintenance costs" are defined in Section 4.

3. TERM AND SURRENDER

(a) The term of the letting of the permanent premises under this Agreement shall commence on a day following the date of completion of construction of the marine terminal, determined as hereinafter provided, and shall expire, unless sooner terminated, on the twentieth anniversary of the date of commencement.

(b) Beginning with the date of commencement of the letting of the interim premises, as hereinafter determined, the Port Authority may enter upon, use and occupy the permanent premises, for the purposes of accommodating interim operations and constructing the marine terminal. All such entry upon, use and occupancy of the permanent premises shall be subject to and in accordance with the provisions of this Agreement. The Marine Terminals Construction Engineer of the Port Authority shall certify to the Commissioner the date of completion of construction of the two southerly finger piers and the associated portion of the headhouse of the marine terminal, and the term of the letting contemplated in paragraph (a) of this Section shall commence on the first day of the calendar month next following such certification, but such commencement date shall in any event occur not later than forty-eight (48) full calendar months after the date of commencement of the letting of the interim premises, unless further postponed by written agreement between the parties. The said Engineer shall also certify the date of completion of the balance of the marine terminal, but unless earlier certified, the same shall be deemed completed in any event on a date not more than twenty-four months after the commencement of the letting of the marine terminal.

(c) The term of the letting under this Agreement as to the interim premises shall commence at 12:01 o'clock A.M. on a day which shall be the day following the latest effective date of surrender of the interim premises, as set forth in one or more agreements to be made between the City and the tenants of the interim premises, but in no event shall the said term commence prior to the day after the Port Authority shall have notified the City in writing that the agency agreements contemplated in Section 31(d) have all been made; and the term of the letting as to the interim premises shall expire on the thirtieth day after the date of the commencement of the term of the letting of the permanent premises under this Agreement, determined as set forth in paragraphs (a) and (b) of this Section, or on such later date as may be approved by the Commissioner on such terms and conditions as he shall determine; provided, however, that the letting of Pier 92 as interim premises shall continue until the thirtieth day after final completion of the marine terminal. The provisions of paragraphs (e), (f) and (g) of this Section shall apply at the appropriate times to the interim premises as well as to the permanent premises, but the provisions of paragraphs (d) and (h) shall have no application to the interim premises or the letting thereof, and the Port Authority shall have no obligation to perform maintenance or repair on the interim premises or any part thereof except as hereinafter specifically set forth.

(d) If the permanent premises or any building, structure or improvement thereon, or any part thereof, at the expiration of the term or its sooner termination, are in need of repair and maintenance (including painting) then the Port Authority shall repair, paint and put the same in good order and condition as determined by the Commissioner in his sole discretion, as though all of such work had been properly done during such term.

(e) On the expiration or sooner termination of the term, the Port Authority will peaceably and quietly leave, give up, surrender and deliver unto the possession of the City without delay the premises, together with all buildings, structures, alterations, additions, changes, replacements and improvements thereon, if any, all of which shall be free and clear of any and all liens, debts or encumbrances of whatsoever kind, nature and description, incurred by the Port Authority or its contractors, and the condition of the permanent premises only, together with the buildings, structures and improvements thereon, shall be as set forth in paragraph (d) of this Section.

(f) Title to all personal property and trade fixtures not part of the original construction, and installed or provided by the Port Authority in or on the premises, is hereby expressly reserved to and in the Port Authority, and the Port Authority shall have the right to remove all of the same upon the expiration or sooner termination of the term, and within thirty (30) days thereafter, provided, however, that the Port Authority shall at its own expense repair any injury to the premises resulting from such removal. Upon written notice from the Commissioner, the Port Authority shall, at its own cost and expense, remove any personal property or fixtures not removed by the Port Authority at the expiration or sooner termination of the term, repairing any injuries to the premises resulting from such removal.

(g) Throughout the term of the letting, except as expressly provided otherwise herein, the Port Authority shall have full and complete control of management and operation of the premises.

(h) Out of the proceeds of bonds to be issued by it and to mature no later than twenty (20) years after the commencement of the term of the letting of the permanent premises, the City shall deposit with a trustee selected by the City and acceptable to the Port Authority the entire construction cost of the marine terminal. The sum shall be deposited and administered as follows:

(i) Not less than sixty days prior to commencement of construction, the Port Authority shall estimate the total cost thereof, and the City shall within fifteen days of such estimate, pay the said sum to the Trustee.

(ii) On a date which shall be thirty days after the delivery by the Port Authority of the estimate required under subdivision (i) above, and on

each of the several following anniversaries of such date during the period of construction, the Port Authority shall deliver to the City an estimate in writing of the total sum required to meet construction costs during the period of twelve months then next following. The City shall thereupon direct the Trustee to place an amount of money equal to such sum, drawn from the fund created under subdivision (i), in an interest-bearing account in the name of the Port Authority and in a depository selected by the City and acceptable to the Port Authority, under terms and conditions permitting the Port Authority to make monthly withdrawals adequate to anticipate and meet required construction cost payments, and permitting extra withdrawals in special circumstances. For each withdrawal, monthly or special, the Port Authority shall submit a statement to the Comptroller of the City of the amount and items of construction cost to be met therefrom.

(iii) Within nine (9) months after completion of construction the Port Authority shall certify to the City the construction cost, now estimated at \$60,250,000 and in the event such cost shall exceed the sum theretofore paid by or on behalf of the City under subdivisions (i) and (ii) above, the City shall pay the deficiency to the Port Authority within sixty (60) days after such certification. If the sum theretofore paid to the Port Authority exceeds the sum so certified, the Port Authority shall pay the excess to the City within thirty (30) days after such certification. Any balance then remaining in the hands of the Trustee shall be payable to the City. The sum so certified shall be subject to audit by the City.

4. RENTAL AND OTHER PAYMENTS

A. Basic Rental for the Permanent Premises:

The Port Authority shall pay to the City for the permanent premises a basic rental annually which shall suffice over the term of the letting of the permanent premises to provide to the City the total of (i) the sum required to amortize

the entire construction cost as certified by the Port Authority and audited by the City, plus (ii) debt service costs (which shall not include payments on account of principal) for the entire period, both as required by the terms of a schedule of debt service requirements hereto attached, hereby made a part hereof, and marked "Exhibit 3." The payment to be made by the Port Authority under this Section for and during the period (not to exceed twenty-four months) from the commencement of the letting of the permanent premises to the final completion of the marine terminal, shall be at a rate two-thirds of that computed in accordance with the foregoing, and such payment shall be, for the basic rental accruing during that period only, full and final payment.

B. Additional Rental for the Permanent Premises:

(a) The Port Authority shall pay the City, as additional rental in each year, the first Seven Hundred Fifty Thousand Dollars (\$750,000) of the excess of actual receipts from all operations at the marine terminal over the sum of the following: (i) all payments currently required to be made under Subsection A and (ii) all operating and maintenance costs as hereinafter defined; and

(b) The balance of the receipts, payable to the City as follows: the sum of Seven Hundred Fifty Thousand Dollars (\$750,000) thereof received in each year and one-half of any such receipts over One Million Five Hundred Thousand Dollars (\$1,500,000) for each year to be held by the Port Authority until the same shall reach a sum which shall be the total of the three highest annual payments made or to be made by the Port Authority as required by Exhibit 3; the other half of such excess, and after accumulation, the entire such yearly balance of receipts, to be paid currently to the City, except that in any event the total amount of the sum withheld for the reserve as above provided and of the sum payable to the City as additional rental under this Subsection B shall not exceed in any year, Two Million Four Hundred Thousand Dollars (\$2,400,000); any surplus of receipts over the sum of (i) that amount, (ii) the annual payments required under Subsection A, and (iii) the operating and maintenance costs, shall be held by the Port Authority for distribution to users of the facility, accomplished by making the surplus a factor towards reduction of tariff charges in subsequent determinations of such charges. The sum reserved shall be available to discharge all deficits (annual and cumulative) in payments of the rental reserved under Subsection A and of the operating and maintenance costs, created by any excess of such payments and costs over receipts; at the expiration of the term any remainder of such reserve and of the reserve for deferred maintenance (with interest, if any is earned), shall be payable as rental to the City.

(c) Payments under Subsection A shall be made quarterly beginning on a date six (6) months after the date of commencement of the letting of the permanent premises. The first such payment shall be for the two previous quarters. Payments

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under Subsection B shall be made annually on April 1 in each year, for the next preceding calendar year, and shall include the net interest, if any, earned on such portion of the receipts as becomes payable. Payments made before costs are finally determined shall be payments on account.

C. Basic Rental for the Interim Premises:

The Port Authority shall pay to the City a basic rental for the interim premises at the annual rate of \$1,821,451.75, payable throughout the term of the letting of the interim premises only, in equal monthly installments in advance, on the first day of each and every calendar month during the said term, with proration on a daily basis for any portion of the term which shall be less than a calendar month, whether at the commencement or at the expiration thereof or both, and provided, that no rental shall accrue hereunder for the period of the letting of the interim premises subsequent to the date of commencement of the letting of the permanent premises except as provided in Section 3(c). Receipts from operations at the interim premises earned from the date of the commencement of the letting of the permanent premises shall be deemed for purposes of this Agreement receipts from operations of the marine terminal.

D. General Rental Provisions:

(a) No breach of any covenant, term or condition of this Agreement other than a breach by the City which prevents or hinders the Port Authority from exercising its rights under this Agreement, shall excuse the Port Authority from the prompt payment of the rentals reserved in this Section 4. The Port Authority shall pay such rentals throughout the term of this Agreement, notwithstanding any provision or clause contained in Section 227 of the Real Property Law of the State of New York.

(b) In the event that the Port Authority, under any law that may hereafter be enacted or applied, shall be or become subject to and liable for payment to the City of any taxes or assessments or other governmental levies or imposts (except charges for water and sewer rental), upon or against the premises or upon any part thereof, then, in addition to other remedies available to it hereunder, the payment by the Port Authority of the amount of such taxes, assessments, levies, or imposts shall, as between the City and the Port Authority, be deemed payment pro tanto of the rent herein reserved under Subsection A or Subsection C as the case may require, and the amount of such payments shall be treated as a cumulative credit against rent otherwise payable under this Agreement if such payments should exceed the amount payable under the said subsections.

(c) "Construction cost" as used in this Agreement shall mean and include all costs in regard to the planning, design and construction of the marine terminal and every part thereof, as such construction is described in the plans to be approved in writing by the Commissioner and to be annexed to this Agreement, and shall include without limitation thereto the following items:

- (1) Payments to or on behalf of contractors;
- (2) Payments for supplies and materials;
- (3) Payments to persons, firms or corporations other than construction contractors for services rendered or rights granted in connection with the construction, including without limitation thereto, payments made in connection with the demolition or removal of buildings or other structures and payments made in connection with the supply, removal, transportation, dumping or disposal of fill, debris or dredged or excavated materials;
- (4) Payments for premiums for performance bonds in regard to construction.
- (5) Payments for premiums for liability and workmen's compensation insurance in regard to demolition and in regard to construction, and in any case in which the Port Authority decides to self-insure any such risk, an amount equal to the premiums which would have been paid for such insurance;
- (6) Payments of premiums for builder's risk and all-risk insurance during construction;
- (7) Payments for purchase of terminal equipment permanently installed and of specialized portable equipment permanently assigned to the marine terminal, and rental payments for equipment used during construction, including any costs of insuring the same;
- (8) Cost to the Port Authority for direct labor and staff actually engaged in the design and construction of the marine terminal;
- (9) Financial costs to the project, if any, of 1 through 8;
- (10) General and Administrative expense (not to exceed 15% of the sum of the foregoing) on account of the planning, design and construction of the marine terminal, in accordance with the Port Authority's present accounting principles and procedures.

(d) In addition to all other payments to be made by the Port Authority to the City, the Port Authority shall pay to the City on or before the date of commencement of the letting of the permanent premises the sum of One Million Five Hundred Thousand Dollars (\$1,500,000) on account of the residual value of structures on the permanent premises to be incorporated in the marine terminal. The Port Authority shall also pay to the City a sum presently estimated at Two Million Five Hundred Seventy Nine Thousand One Hundred Thirty One Dollars and Sixty Eight Cents (\$2,579,131.68) as rent for the permanent premises during the period of construction which is presently estimated at three years. The actual payment shall be adjusted proportionately to reflect any construction period which is less than or which exceeds three years. The sum shall be paid in approximately equal annual installments during the period of construction and on a quarterly basis beginning on a date six months after the commencement of the letting of the interim premises. Such payments shall be made out of the proceeds of Port Authority bonds to be issued therefor.

(e) "Operation and maintenance expense" (also sometimes called "operation and maintenance cost" in this Agreement) as used in this Agreement shall mean the expense of the Port Authority which is directly attributable to the operation and maintenance of the terminal during the current year (other than the rent payable to the City by the Port Authority for the premises and general and administrative expense.) No deduction, allowance or provision for depreciation, except for automotive equipment and equipment ancillary thereto, is to be included in the operation and maintenance expense. It shall include the amount estimated to be required for deferred maintenance and a sum equal to fifteen (15%) percent of the foregoing operation and maintenance expense, for general and administrative expense, and an estimated Four Hundred Fifty Three Thousand Three Hundred Thirty Dollars (\$453,330.00) annually, representing principal amortization over a 20 year period and actual debt service, of the bonds issued by the Port Authority to provide funds for the payment of the residual value of structures on and the rent for the permanent premises during construction, as provided for in paragraph (d) above.

5. CASUALTY

(a) In the event of partial or total destruction of the marine terminal by a casualty which has been insured against, the Port Authority shall expend the insurance proceeds (other than rental insurance proceeds) in reconstruction, unless otherwise directed in writing by the City. In the event of such reconstruction there shall be no abatement of rental, but in the event of a written direction by the City not to perform reconstruction, this Agreement shall terminate with the effect of expiration, as of the date of the occurrence of the casualty, but in such event the Port Authority shall transfer to the City.

the insurance proceeds retaining only a sum of money equivalent to the portion of the money paid to the City under paragraph (d) of Subsection D of Section 4 of this Agreement then not yet returned through payment of amortization as an element of operating and maintenance costs, as set forth in paragraph (e) of the said Sub-Section D. In the event there is a non-insured casualty which destroys the permanent premises or renders the same substantially unsuitable for the purposes of the letting under this Agreement, the City shall have the option to rebuild, and the letting shall be suspended until either (i) if the City does not rebuild, the term of the letting shall be deemed to have expired as of the date of the casualty, and the Port Authority shall be released from all obligations under this Agreement as of such date; or (ii) if the casualty occurs during the first seven years of the term of the letting and the City rebuilds, the letting shall recommence upon completion of construction and shall continue thereafter for the number of years (including parts of a year) which remained under the original term of the letting at the time of the occurrence of the casualty; or (iii) if the casualty occurs during the last thirteen years of the term of the letting and the City rebuilds, and if the number of passengers handled through the marine terminal during the period of twelve months ending with the date of the casualty was in excess of 500,000, the letting shall recommence upon completion of construction and continue thereafter for the number of years (including parts of a year) which remained under the original term of the letting at the time of the occurrence of the casualty.

(b) In the event of damage to the interim premises by a casualty for which insurance is in force, then if in the opinion of the Port Authority the necessary repairing or rebuilding can be done within ninety (90) days, the Port Authority shall cause the same to be performed, and the rental shall not be abated. If, however, in the opinion of the Port Authority the damage is too great to be repaired within ninety (90) days, then the Port Authority shall convey the insurance proceeds to the City and shall have no obligation whatsoever in connection with repair or rebuilding, and the rental shall be abated for that portion of the interim premises rendered unsuitable for the period it is in such condition. In no event shall the obligation of the Port Authority exceed the repair or rebuilding which can be accomplished by use of insurance proceeds received.

6. REPAIRS

The Port Authority except in the event of casualty, at all times during the term of the letting, shall keep, maintain and take good care of the permanent premises together with the piers, piersheds, bulkheads (including the bulkhead on the boundary line of the permanent premises), pilings and all other buildings, structures and improvements thereof, if any, whether now on the premises or hereafter added, and shall make all necessary repairs, inside and outside, structural or otherwise, including the

rebuilding or replacement of the piers, piersheds, bulkheads, pilings and other buildings, structures or improvements thereon or any parts thereof, so as to keep and maintain them in good and sufficient repair and sufficiently painted.

7. ASSIGNMENT AND MORTGAGES

(a) The Port Authority shall not assign, mortgage, hypothecate, or encumber this Agreement or any part thereof. In the event this Agreement is assigned, pledged, mortgaged, hypothecated or encumbered in any way, the City, in addition to any other remedies it may have, may collect rent from any assignee of the premises, and apply the net rent collected to the rent reserved herein; but no such assignment or collection shall be deemed a waiver of this covenant or the acceptance of the assignee as a tenant or a release of the Port Authority from the further performance by it of the covenants on its part to be performed.

(b) Subject to the provisions of paragraph (a), the Port Authority may permit third persons to use and occupy part or all of the premises under subleases, permits and other contractual arrangements including without limitation thereto use under published tariffs, but only for purposes consistent with this Agreement and subject to all of the terms, covenants and conditions of this Agreement. The Port Authority shall not, however, sublet the premises for terms extending beyond the expiration of the term of this Agreement.

8. SNOW REMOVAL, POLICE AND FIRE PROTECTION

(a) The City shall not be responsible for removal of snow and ice from the premises. The Port Authority shall not place snow and ice upon any of the public streets, highways or marginal streets of the City.

(b) The City will have no responsibility for maintaining fire or police personnel in or on the premises. The City agrees that its Police Department will respond to calls from the Port Authority in the event of the commission of crime, rioting, disasters and other emergencies in the premises, and that its Fire Department will respond to calls to put out all fires and handle emergencies.

9. WAIVER OF LIABILITY

With respect to the permanent premises only, the Port Authority further covenants and agrees that the City shall not be liable for any damage, injury or liability that may be

sustained by the Port Authority or any other person whatsoever, or to their goods and chattels from any cause whatsoever, arising from or out of the occupancy of the permanent premises, including but not limited to damage by the elements, leakage, obstruction, or other defect of water-pipes, gas-pipes, soil-pipes, electrical apparatus, other leakage in or about the permanent premises or in and from any other part of the structure or structures included in the permanent premises, or the condition of the permanent premises or any part thereof. The Port Authority hereby expressly releases and discharges the City from any and all demands, claims, actions and causes of action arising from any of the aforesaid.

10. ACCIDENTS

(a) If at any time during the term, in any action or actions brought to recover damages for injuries to any person or persons (including death) or to property by reason of any accident happening on or in the premises, or by reason of any act or occupancy under this Agreement whether on or in proximity to the premises, a judgment shall be recovered against the City, then upon written demand being made upon it, the Port Authority, its successors or assigns, provided the notice hereinafter provided for shall have been given, shall pay to the City, its successors or assigns, the amount of such judgment, together with all reasonable and proper costs, expenses, and counsel fees to which the City may or shall be subjected in defense of such action and including any appeals taken with the consent of the Port Authority.

(b) The City shall give the Port Authority notice of all claims for injuries to any person or persons or damage to property as aforesaid made upon it and shall with reasonable promptness and diligence furnish to the Port Authority full information in regard thereto. The City shall not settle any such claims without the written consent of the Port Authority; but the Port Authority may, at its option, settle any such claim on behalf of the City, paying from its own funds to the claimant for a release in favor of the City. If any suit shall be brought against the City based upon any such claim, the City shall furnish to the Port Authority copies of all process and other papers served upon the City in connection with such suit. The Port Authority shall have the right to appear and defend any such suit and the City shall cooperate with the Port Authority in such defense. If any judgment or award shall be entered against the City upon the basis of any such claims, the City shall at the request of the Port Authority appeal therefrom at the sole cost and expense of the Port Authority and the City shall cooperate with the Port Authority in such appeal. All payments, expenditures and costs arising under this Section shall be elements of operating and maintenance costs.

11. CONDEMNATION

In the event of any condemnation or taking or conveyance in lieu of condemnation, whether of the whole premises or such part thereof as shall make it impracticable for the Port Authority to operate the remainder under this Agreement, then the letting under this Agreement shall come to an end immediately upon vesting of title in the condemning body, there shall be no award for the leasehold, and the Port Authority shall have no claim against the City, by reason of the insufficiency or claimed insufficiency of the award to reimburse the Port Authority for any unamortized portion of amounts expended by the Port Authority except to the extent required so that the Port Authority shall have a right to participate in the award and to receive such portion of the award, compensation or other consideration as shall equal the portion of the money paid to the City under paragraph (d) of Subsection D of Section 4 of this Agreement then not yet returned through payment of amortization as an element of operating and maintenance costs as set forth in paragraph (e) of the said Subsection D; the entire balance of the award, compensation or consideration shall be free of any claim by the Port Authority. In the event of condemnation of a part only of the premises, the Port Authority shall have the right at its option to remain in possession of the remaining portion of the premises under all of the terms and provisions of this Agreement, except that the rentals to be paid thereafter shall be as agreed upon between the Port Authority and the Commissioner, subject to the approval of the Board of Estimate.

12. INSURANCE

(a) The Port Authority shall for the benefit of the City, furnish Builders' Risk Insurance - Completed Value Form, during and in the course of construction, insuring against loss or damage by fire, standard extended coverage perils and such other perils as the Commissioner may from time to time certify as perils to be insured against, provided insurance against such perils so certified is commercially available. The policy shall name the City as sole insured and shall provide that loss, if any, shall be adjusted with and paid to the City only. The above insurance shall provide that all materials delivered to the site, whether or not attached to the realty, shall be determined to be the property of the City and covered by the above policy.

(b) In addition to the other insurance provided for in this Agreement, the Port Authority shall furnish the City prior to the commencement of any work Owners Protective Liability Insurance for the benefit of the City (and which may include the Port Authority) within limits of at least \$5,000,000 for one person, and \$5,000,000 for more than one person injured or killed in any one occurrence; \$5,000,000 for property damage; and \$40,000,000 excess coverage.

(c) During the term of the letting of the permanent premises, the Port Authority shall, for the benefit of the City, keep the permanent premises and all structures, improvements and fixed equipment thereon, insured against loss or damage by fire, lightning, floating ice, collision of any ship or vessel or floating object, tidal wave or flood (meaning the rising of navigable waters), snow, rain, sand, dust, windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles and smoke, and by action of the elements, meaning thereby sudden or unusual action of one or more of the physical forces of nature (excluding earthquake or volcanic eruption and excluding loss by any form of marine life or resulting from gradual decay or deterioration), and as a result of fall, collapse or subsidence caused by any of the perils or elements included hereunder; provided, however, that if any of the foregoing coverages shall not be commercially obtainable at the time of the execution of this Agreement, or shall thereafter cease to be commercially obtainable, the Port Authority shall be excused from obtaining such coverages and, provided, further, that if coverage of other or presently excluded hazards or different or additional coverages should become commercially obtainable, the Port Authority agrees to obtain such new coverages on demand by the Commissioner. All such insurance shall be in an amount equal to 100% of the replacement cost. The Port Authority shall also have the right to purchase rental insurance.

(d) Certified copies of policies issued by insurance companies evidencing the insurance required by this Section shall be filed in the office of the Commissioner, with proof of payment of premiums, and shall be subject to approval by the Commissioner as to form and minimum sufficiency of coverage, but the Port Authority may purchase additional insurance at higher limits. If the Port Authority, after written notice from the Commissioner, neglects or refuses or is unable to obtain any of the insurance required by this Agreement, then the City may procure the same, wherever available, and the Port Authority shall reimburse the City for the premiums. Except as set forth in paragraphs (a) and (b) hereof, such policy or policies shall provide that loss, if any, shall be payable to the Port Authority, which shall hold the proceeds of all insurance other than rental insurance in a fund for the purpose of repairs, rebuilding and replacement of the permanent premises, the pier, the piershed, the bulkhead and pilings, or any other structures, improvements or fixed equipment thereon damaged or destroyed by reason of any of the risks insured against by such policy or policies. Upon the completion of the repairs, rebuilding and replacements, if the amount of the proceeds of insurance exceeds the cost of such repairs, rebuilding and replacements the Port Authority shall pay such surplus to the City.

(e) The Port Authority at its own expense shall also furnish the City with liability insurance issued by a responsible company or companies approved by the Commissioner, for the protection of the City against any claims, suits, demands, causes of action or judgments by reason or personal injuries (including death) sustained by any person or persons, and for any claim of damage to property occurring on or in the premises, or arising out of or as a result of the operation, control or occupancy thereof by the Port Authority or any undertenants, assignees or occupants thereof whether on or in proximity to the premises. Such liability insurance shall provide limits of at least \$5,000,000 for property damage and at least \$5,000,000 for one person, and \$5,000,000 for more than one person injured or killed in any one occurrence, with a provision for \$40,000,000 excess coverage.

(f) The Port Authority may from time to time and at any time, elect to become a self-insurer as to part or all of the risks of loss described hereinabove in this Section 12, except those described in paragraph (a) and (b) above on the same terms and general conditions as are provided in standard insurance policies covering such risks then in general use in New York; and in the event of a loss which would have been covered by any such policy or policies, the Port Authority shall make available, out of its funds, an amount equivalent to that which would have been paid by an insurance carrier under the same circumstances, and shall apply the said amount in like manner as if said amount were the proceeds of an insurance policy or policies obtained in accordance with this Section.

(g) The Port Authority shall continue existing insurance coverages on the interim premises throughout the letting thereof.

(h) As between the City and the Port Authority, the Port Authority hereby undertakes and agrees to indemnify the City and save it harmless from any claims, suits, demands and causes of action by reason of personal injuries sustained by any person or persons, including death, and from any claims of damage to property, occurring on or in the premises, or arising out of or as a result of the operation, control or occupancy thereof by the Port Authority or any undertenants, assignees or occupants thereof whether on or in proximity to the premises.

[There is no paragraph (i) in this Section.]

(j) The Port Authority further agrees to execute and deliver any additional instruments and to do or cause to be done all acts and things, that may reasonably be requested by the Commissioner in accordance with this Agreement, fully to insure the City against all damage and loss as herein provided

for and to effectuate and carry out the intents and purposes of this Section. The policy or policies furnished may provide that there be no subrogation against the Port Authority.

(k) All premiums payable for insurance hereunder and self-insuring amounts in lieu of premium shall be elements of the operating and maintenance costs under this Agreement.

13. SURVEY AND CONDITION OF PREMISES

(a) A representative of the Commissioner jointly with a representative of the Port Authority shall make a survey of the permanent premises before or at the commencement of the term provided for herein.

(b) A representative of the Commissioner jointly with a representative of the Port Authority shall make a survey of the permanent premises a reasonable time before expiration of the term and shall make a schedule of the condition thereof at the time of such survey. If, after notice, the Port Authority shall fail, neglect, refuse or delay to join in making such survey, then the City may make such survey independently and the Port Authority shall be deemed to have adopted such survey as binding upon it as to condition.

14. DEPTH OF WATER

The Port Authority shall perform or cause to be performed such dredging or other work in the slips adjacent to the marine terminal as may be required from time to time in the opinion of the Port Authority during the term under this Agreement. On the expiration or earlier termination of the term of the letting, the Port Authority shall perform or cause to be performed the necessary dredging or other work required to provide a depth thirty-eight (38) feet below mean low water in the outer berths, and thirty-four (34) feet below mean low water in the inner berths. These depths are agreed upon as providing capacity for vessels now in use, and other depths will be provided by the Port Authority (as agreed upon in writing by the Commissioner) if changes in design of vessels in the passenger trade make such depths advisable.

15. SUNKEN CRAFT

(a) If during the term of this Agreement, the waters in the permanent premises shall become obstructed in whole or in part by the sinking of any waterborne craft, other than

waterborne craft owned or operated by the City, the Port Authority, after notice from the Commissioner, shall promptly remove such obstruction, or cause the same to be removed, the cost thereof to be included in operating and maintenance costs. If, after notice from the Commissioner the Port Authority fails to remove such obstruction, the City may in its discretion undertake the removal thereof, and in such event the Port Authority shall reimburse the City for the reasonable expenses so incurred. If during the term of this Agreement the waters in the premises shall become obstructed in whole or in part by the sinking of any waterborne craft owned or operated by the City, through no fault or negligence of the Port Authority, then the City, after written notice served upon the Commissioner by the Port Authority, shall promptly remove such obstruction or cause the same to be removed, without cost or expense to the Port Authority. If, after notice from the Port Authority, the City fails to remove such obstruction, the Port Authority may in its discretion undertake the removal thereof, and in such event the City shall reimburse the Port Authority for the reasonable expenses so incurred.

(b) The Port Authority shall save harmless the City from any damages or claims for damages that may arise by reason of the presence in said waters of any sunken waterborne craft, other than one owned or operated by the City and the City shall save harmless the Port Authority from any damages or claims for damages that may arise by reason of the presence in said waters of any sunken waterborne craft owned or operated by the City.

16. WATER SERVICE AND SEWER RENTS

(a) The City shall provide and maintain all water supply lines up to the perimeter of the premises. The Port Authority shall pay the City for all water consumed at the City's established rates, and for all sewer rents applicable to the premises at the City's established rates. The Port Authority, at its own cost and expense, shall install and maintain such meter or meters as may be determined by the Department of Water Supply, Gas and Electricity as best suited for determining the amount of water consumed or used within the premises.

(b) The City shall have no liability for the costs of any heat, gas, coolant and electricity furnished to the premises, except as included in operating and maintenance costs.

purposes. The City will cooperate fully with the Port Authority in regard to construction of the marine terminal. To that end, the City will make available as needed portions of the marginal street and other neighboring areas required for construction purposes, including without limitation thereto the receipt and storage of equipment, materials and supplies. The precise areas and terms of use shall be set forth in Occupancy Permits requiring nominal fees or rentals, to be issued by the Commissioner on the request of the Port Authority.

18. EASEMENTS

The letting of the premises is subject to any existing easements in favor of the City for city-owned utilities and the rights of gas, electricity and other public utility companies to maintain facilities therein. The City hereby represents to the Port Authority that there are no such easements interfering or which might interfere, with the construction contemplated under this Agreement, and covenants that the Port Authority may use without additional charge all easements on or through the premises required by its operations thereof.

19. POLICY IN REGARD TO CITY ORDINANCES AND REGULATIONS

In the construction, improvement, operation and maintenance of the premises, the Port Authority will as a matter of policy, conform to the enactments, ordinances, resolutions and regulations of the City and its various departments, administrations, boards and bureaus, in regard to the construction and maintenance of buildings and structures, and in regard to health and fire protection on the premises, which would be applicable if the Port Authority were a private corporation, to the extent that the Port Authority

waterborne craft owned or operated by the City, the Port Authority, after notice from the Commissioner, shall promptly remove such obstruction, or cause the same to be removed, the cost thereof to be included in operating and maintenance costs. If, after notice from the Commissioner the Port Authority fails to remove such obstruction, the City may in its discretion undertake the removal thereof, and in such event the Port Authority shall reimburse the City for the reasonable expenses so incurred. If during the term of this Agreement the waters in the premises shall become obstructed in whole or in part by the sinking of any waterborne craft owned or operated by the City, through no fault or negligence of the Port Authority, then the City, after written notice served upon the Commissioner by the Port Authority, shall promptly remove such obstruction or cause the same to be removed, without cost or expense to the Port Authority. If, after notice from the Port Authority, the City fails to remove such obstruction, the Port Authority may in its discretion undertake the removal thereof, and in such event the City shall reimburse the Port Authority for the reasonable expenses so incurred.

(b) The Port Authority shall save harmless the City from any damages or claims for damages that may arise by reason of the presence in said waters of any sunken waterborne craft, other than one owned or operated by the City and the City shall save harmless the Port Authority from any damages or claims for damages that may arise by reason of the presence in said waters of any sunken waterborne craft owned or operated by the City.

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(b) The City shall have no liability for the costs of any heat, gas, coolant and electricity furnished to the premises, except as included in operating and maintenance costs.

17. CONSTRUCTION OF MARINE TERMINAL

The Port Authority shall promptly commence and diligently pursue to completion the construction of the marine terminal on the permanent premises. The marine terminal shall be built in accordance with final plans and specifications which, together with contract procedures, shall be approved in writing in advance by the Commissioner, the plans and specifications to be attached to this Agreement and deemed a part hereof. Such plans shall show a structure consisting of a three-level headhouse and three four-level finger piers, extending to the west approximately as far as the United States Pierhead Line, together with berths between and on each side of the finger piers. The Port Authority shall not, except as may be required for a flare to accommodate surface traffic in the easternmost one hundred (100) feet of each of the outer berths, build any structure either (i) to the south of a line drawn parallel to the southerly boundary line of the premises and one hundred eighty (180) feet north thereof; or (ii) to the north of a line parallel to the northerly boundary line of the premises and one hundred eighty-seven and one half (187.5) feet south thereof. The plans shall also include provision for a park area and for installing in the headhouse on the permanent premises columns of adequate strength to accommodate and support a planned pedestrian platform intended to be constructed by the City at its sole cost and expense, extending outside the permanent premises, and connecting the marine terminal and a proposed redevelopment of the area east of the street which borders the marine terminal on the east. The plans and specifications may be modified, with the written approval of the Commissioner. After construction, except for any work which (i) alters either the character of the use of the premises or the basic functional plan as originally conceived, or (ii) diminishes or extends the useful life of the facility or (iii) involves a project expenditure of \$50,000 or more, the Port Authority shall not be required to obtain the prior approval in writing of the Commissioner. For other work performed under plans and specifications prepared by or on behalf of the Port Authority, copies of such plans and specifications shall be filed with the Commissioner, for informational

purposes. The City will cooperate fully with the Port Authority in regard to construction of the marine terminal. To that end, the City will make available as needed portions of the marginal street and other neighboring areas required for construction purposes, including without limitation thereto the receipt and storage of equipment, materials and supplies. The precise areas and terms of use shall be set forth in Occupancy Permits requiring nominal fees or rentals, to be issued by the Commissioner on the request of the Port Authority.

18. EASEMENTS

The letting of the premises is subject to any existing easements in favor of the City for city-owned utilities and the rights of gas, electricity and other public utility companies to maintain facilities therein. The City hereby represents to the Port Authority that there are no such easements interfering or which might interfere, with the construction contemplated under this Agreement, and covenants that the Port Authority may use without additional charge all easements on or through the premises required by its operations thereof.

19. POLICY IN REGARD TO CITY ORDINANCES AND REGULATIONS

In the construction, improvement, operation and maintenance of the premises, the Port Authority will as a matter of policy, conform to the enactments, ordinances, resolutions and regulations of the City and its various departments, administrations, boards and bureaus, in regard to the construction and maintenance of buildings and structures, and in regard to health and fire protection on the premises, which would be applicable if the Port Authority were a private corporation, to the extent that the Port Authority

finds it practicable so to do, without interfering with, impairing or affecting the efficiency and economy of its marine terminal operations, or its ability to operate the marine terminal on a self-supporting basis, or its obligations, duties and responsibilities to the two States, its bondholders and the general public; but the decision of the Port Authority as to whether it is practicable so to do shall be controlling. To that end, and without hereby altering or enlarging the obligations of the Port Authority expressed in Section 17, the Port Authority shall submit copies of the plans and specifications for buildings and structures to the appropriate City officials and shall consult with them with respect thereto, and shall receive their comments and suggestions thereon.

20. AUDIT

The Port Authority shall keep, and require others to keep, in a manner consistent with accepted accounting practice, complete records and accounts in regard to the operation, maintenance and construction or other capital development, and of all gross revenues and expenses, arising out of the operation of the permanent premises; and shall allow the City or any duly authorized representative of the City, at all reasonable times, to examine said records and accounts, also to examine all contracts and agreements relating to construction, maintenance and operation and all leases or agreements now or hereafter made with any and all tenants, occupants and users thereof. The Port Authority shall also make available such other documents as reasonably may be required by the City for the purposes of verifying, if it shall so desire, the statement or statements furnished by the Port Authority.

21. INSPECTION

The City through its properly designated officials and employees in the performance of their official duties shall at all times have the right of free access to all portions of the premises for purposes of inspecting same. The Port Authority shall correct conditions noted by the City in such inspections, in sixty (60) days after notice except where in the opinion of the Port Authority other action should be taken.

22. COVENANT OF QUIET ENJOYMENT

The City agrees that the Port Authority on paying the rent herein reserved promptly when due and on performing all of the other terms, covenants and conditions set forth in this Agreement promptly as required, shall and may peaceably and quietly have, hold and enjoy the premises for the term hereinbefore specified unless such term shall cease, close or expire sooner.

23. FEES AND EXPENSES

If the Port Authority shall default in the performance of any covenant on its part to be performed by virtue of any provision of this Agreement, the City may, unless the Port Authority takes action to remedy such default within thirty (30) days of receipt from the City of a notice of such default, perform the same for the account of the Port Authority. However, if such default creates an emergency condition the City may perform such work upon the failure of the Port Authority to take such action as soon as may be practicable after the receipt of the said notice. If the City, in pursuance of this Section, pays any sum of money by reason of the Port Authority's failure to comply with any provision of this Agreement, or if the City is compelled to incur any expense in instituting, prosecuting or defending any action or proceeding instituted by reason of any default of the Port Authority, the sum or sums so paid by the City, together with interest, costs and damages shall be deemed to be additional rent hereunder and shall be due from the Port Authority on the first day of the month following the receipt by the Port Authority of a statement of such expense, interest, costs or damages certified to by the Comptroller of the City. Such payments when made, less any portion representing actual cost to the City, shall be included in operating and maintenance costs.

24. SURRENDER BY RESOLUTION

Except as otherwise expressly provided in this Agreement, no act done by the City, or its officers or agents, during the term hereby granted, shall be deemed an acceptance of a surrender of the premises, and no agreement of surrender, to accept a surrender of the premises shall be valid, unless the same shall be duly authorized by resolution of the Board of Estimate.

25. BINDING ON SUCCESSORS

Each and every of the terms, covenants and provisions of this Agreement shall inure to the benefit of and be binding upon the parties hereto and, except as herein otherwise provided, their respective legal representatives, successors and assigns.

26. SIGNS AND ADVERTISING

No advertisement, notice or sign shall be placed or fixed to any of the structures, appurtenances, or any other part of the outside of the premises, except such as shall have

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first received the written approval of the Commissioner and of the Port Authority. The Port Authority will remove from the interior signs not related to operation of the marine terminal to which the City objects. The City shall have no right to install any interior signs.

27. SECTION HEADINGS

The section or subsection headings are for reference purposes only and shall not be deemed descriptive of the sections or subsections.

28. NOTICES

Except as herein otherwise provided, all notices required to be sent by either party to the other shall be in writing and shall be personally delivered or forwarded by certified mail, addressed as follows:

To the Port Authority

Executive Director of the Port Authority
(or his successor in duties)
111 Eighth Avenue
New York, New York 10011

To the City

Commissioner of the Department of Ports and
Terminals of the Economic Development
Administration
(or his successor)
Battery Maritime Building
New York, New York 10004

All communications shall be forwarded to the above addresses until notice in writing of change of address is forwarded by either party to the other by certified mail.

29. NON-LIABILITY

Neither the Commissioners of the Port Authority nor any of them, nor any officer, agent or employee thereof, nor the Commissioner acting for the City, nor any of their agents or employees, as individuals other than in their official capacity, shall be charged personally by the City or the Port Authority (as the case may require) with any liability, or held liable to the City or to the Port Authority (as the case may require) under any term or provision of this Agreement, or because of its execution or attempted execution, or because of any breach, or attempted or alleged breach thereof.

W F T

A J T

30. TITLE

In the event that it shall be or become necessary for the City to obtain a grant or grants of lands under the water from the State of New York permitting or confirming the power of the City to lease all or any part of the premises for the purposes of this Agreement, the City shall obtain the same at its own cost and expense; and the City shall hold the Port Authority harmless from and against any claims and demands of the State of New York arising from any interest of the State of New York in any part of the premises.

31. CONSOLIDATED OPERATIONS

(a) In implementation of the determinations of the City and of the Port Authority based on the study hereinabove mentioned the City and the Port Authority agree to do everything within their power to effectuate the consolidation of passenger vessel service at the marine terminal. To that end, the City and the Port Authority will terminate existing leases and other agreements (except this Agreement) authorizing the use of waterfront property for passenger vessel operations, wherever such terminations are within their contractual power, so that within thirty (30) days after commencement of the letting hereunder, such terminations shall be effective. In any case where the City or the Port Authority has no contractual right so to terminate, it will endeavor by negotiation to provide for such termination. After the execution of this Agreement on behalf of the City and the Port Authority, neither will enter into any agreement with owners or operators of or agents for passenger vessels, authorizing the use of property for any operations in connection with such vessels except with the provision that the term of the use under each such agreement shall expire within thirty (30) days after the commencement of operation of the marine terminal under this Agreement. Further, except as may be expressly required by existing agreement or agreements, by statute, or by order of a court of competent jurisdiction, and during the term of the letting under this Agreement, neither the City nor the Port Authority will issue any work permit or other construction approval or consent whereby structures suitable for such operations may be provided whether by alteration of existing structures, or by new construction, anywhere within the jurisdiction of the City or the Port Authority. The making of provisions for emergency operation elsewhere shall not be deemed a breach of this covenant. An occasional, casual or inadvertent berthing of a passenger vessel elsewhere on City or Port Authority property shall not be deemed a breach, but all revenues therefrom shall be payable to the Port Authority and when so paid shall be treated as receipts from operation of the marine terminal. If with the concurrence of

the Port Authority, the City, in implementation of this covenant, refuses to issue a work permit requested for construction on privately-owned property and such refusal results in a cause of action in which the City is actually required to respond in damages, then, provided (i) the City has given the Port Authority an opportunity to participate in the defense of such action (which shall include settlement and appeal, both as required by the Port Authority); (ii) that the judgment is not entered on mere default or consent and shall have been appealed to the highest authority required by the Port Authority, and (iii) have been paid, the Port Authority will reimburse the City, such sum reimbursed to be an element of operating and maintenance costs.

(b) During the term of the letting hereunder and any extension thereof and for so long thereafter as the marine terminal is (i) actually being operated so that the consolidated passenger vessel operations of the Port of New York are being handled there and (ii) remains safe, sound, and of sufficient capacity to handle all such vessels serving or desiring to serve the Port of New York and their passengers comfortably, conveniently, and in a manner consistent with the standards of passenger vessel terminal operation in the major ports of the world, neither the City nor the Port Authority shall promote, finance, establish, construct, operate, or maintain any pier, wharf, bulkhead, dock, terminal or other facilities for the accommodation of passenger vessels, or authorize any other person so to do; but this covenant shall remain in effect for no more than fifty years after the expiration of the original term of the letting of the permanent premises. In the event that the City shall breach the covenants contained in this Section, the Port Authority shall have the right to terminate this Agreement on the giving of thirty (30) days' written notice, and at the expiration of the notice, the Port Authority shall have no liability or obligation to pay the rent reserved herein for any portion of the term which would have remained but for such termination.

(c) This Agreement shall not be effective unless prior to the commencement of the letting a companion agreement is made among the Port Authority, the City and those steamship operators presently intending to use the facility, which shall contain a provision that neither the Port Authority nor the City will permit use of any properties under its jurisdiction or operated by it for the handling of passenger vessels as a marine terminal operation except as may be required by emergency weather conditions or federal governmental order. Such companion agreement shall contain further an undertaking by the various steamship operators to operate no passenger vessels to any terminal or stopping place in the Port of New York other than the interim premises during the term of the letting thereof hereunder, or other than the marine terminal during its operation.

(d) Further, this Agreement shall not become effective unless agreements for operation of the piers constituting the interim premises as agents of the Port Authority shall have been made between the Port Authority and persons, firms or organizations capable of acting as such agents, in form and substance satisfactory to the Port Authority. The Port Authority undertakes to progress negotiation of such agency agreements with due diligence. Such agreements shall contain provisions satisfactory to the Commissioner and subject to his approval.

(e) Upon the execution of agreements of surrender of lease by the City and the respective present lessees of properties known as Piers #40, #84, #88 and #92, North River, more particularly described in the said leases, the said leases shall terminate as of the date to be mutually agreed upon by the parties and set forth in the said agreements. The Commissioner is authorized, without further approval of the Board of Estimate, to execute in behalf of the City such agreements and terminate the said leases. Said agreements shall contain a provision that the lessee of the respective properties shall remain liable for any and all obligations which have accrued against it under the terms, conditions and covenants of its lease to and including the effective date of surrender and termination of the lease.

32. TARIFFS

The Port Authority shall have the right to fix the rates of dockage and wharfage and the amounts of passenger fees, visitors' fees and parking rates, for all users of the marine terminal, and shall have the right to change the same at annual intervals. All such rates and charges shall be incorporated in published tariffs. However, it shall be the endeavor of the Port Authority to scale such charges so as to cause the receipts from the various sources of revenue hereinabove listed to cover at least all charges payable to the City under the provisions of Subsections A and B of Section 4 of this Agreement, having due regard to estimated maintenance and operating costs, and to increases thereof which may be occasioned by the passage of time and the aging of the facility. The Port Authority shall have the right to require the City to hold for project purposes a portion of the funds in the deferred maintenance reserve, payable to the City under this Agreement at the expiration thereof.

33. DEFICIT PAYMENTS

If in the opinion of the Port Authority, after an assessment of the situation and the condition of the marine terminal during the nineteenth year of the term of the letting thereof, the revenues theretofore received and anticipated to be received during the twentieth year of the term will not suffice to pay off the basic rental due to the City under the provisions of Subsection A of Section 4 plus the operating and maintenance costs of the twenty-year term, the Port Authority shall notify the City to that effect not later than the nineteenth anniversary of the date of commencement of the letting of the permanent premises; and the Port Authority shall thereupon have the option to continue the term of the letting beyond the twentieth anniversary of such date for such period up to the twenty-fifth anniversary thereof as it may elect (except that the renewal term shall be not less than a year) on all the terms and conditions herein set forth relating to the permanent premises, except that the rental for the period subsequent to the said twentieth anniversary shall be at an annual rate which shall be the greater of (i) \$1,000,000 or (ii) one-half the excess of receipts from operations over current operating and maintenance costs. The remainder of the receipts during such extended term shall be used to discharge current operating and maintenance costs and all accumulated deficits.

34. RENEWAL

The Port Authority shall have an option to renew the letting of the permanent premises for a period extending beyond the initial term and any extended term, on all the terms, provisions, covenants and conditions of this Agreement, except that the rental payable to the City for the renewal term of the letting and the extent of the renewal term shall be as agreed upon between the Commissioner and the Port Authority and approval by the Board of Estimate during the nineteenth year of the initial term, or later if so agreed in writing formally executed by the Commissioner and the appropriate officer of the Port Authority.

35. ANTI-DISCRIMINATION

The Port Authority, in keeping with its long and well-established policy not to discriminate against any person, agrees that in the performance of work, labor and services by it under this Agreement, there shall be no discrimination against any person because of age, sex, religion, race, creed, color, national origin or ancestry.

36. FEDERAL MARITIME COMMISSION

This Agreement shall be null, void and of no effect unless and until the same shall have been approved by the Federal Maritime Commission, as may be required by law.

37. MISCELLANEOUS

Except as herein otherwise expressly provided, the Port Authority shall have full power and discretion to proceed with the financing, rehabilitation, expansion, improvement, development, operation and maintenance of the marine terminal and of the interim premises, and to enter into such contracts, agreements, subleases or other arrangements with respect thereto as it may deem necessary and desirable, and all matters connected therewith, including but not limited to, all details of financing, construction, leasing, charges, rates, tolls, contracts, and operation shall be within the sole discretion of the Port Authority; and the decisions of the Port Authority in connection with any and all matters concerning the marine terminal and the interim premises shall be controlling, provided that all such things shall be done by the Port Authority in its own name and on its own credit.

38. RIGHT OF ACCESS

The Port Authority, its lessees, permittees, contractors and all persons, firms and corporations doing business with it or with any of them, shall have a right of access at all times to the premises over the city streets and the marginal areas at or bordering the same. In its use of the upland on the shore side of the outer berths, which upland borders or is contiguous to the permanent premises, and in its permissions to others to use the same, the City shall safeguard and provide for such right of access. The Port Authority shall permit use of the outer berths for navigational manoeuvring by others, provided it shall not constitute unreasonable interference with use thereof by users of the marine terminal.

39. ILLEGAL USE DETERMINATION

The Port Authority covenants and agrees that in the event the use or a proposed use of the premises as set forth in Section 1 of this Agreement, is declared illegal by a court of competent jurisdiction, neither the City nor the Commissioner, nor any of their agents, officers or employees shall be liable for any damages arising out of or related to such illegal use or proposed use; and the Port Authority shall have the right to terminate this Agreement with the effect of expiration, as of the date of such judgment.

40. TERMINATION ON DEFAULT

If the Port Authority shall fail to perform, keep and observe any of the terms, covenants or conditions herein contained on the part of the Port Authority to be performed, kept, or observed, the Commissioner may terminate this Agreement, unless the Port Authority takes action to remedy such default within sixty (60) days of the service of a notice of such default and cures such default within a reasonable time after such default, or, if such default creates an emergency condition, unless the Port Authority shall take action as soon as may be practicable after the receipt of such notice. This Agreement shall terminate upon the receipt by the Port Authority of a notice of termination served by the Commissioner as herein provided and shall expire in the same manner and to the same effect upon such receipt of said notice as if that were the expiration of the original term.

41. DEFAULT

The Port Authority covenants that if any default be made by it in the payment of the rent or any part thereof herein reserved, or if it shall default in the performance of any of the other covenants and agreements herein contained, upon the failure of the Port Authority to take action to remedy such default within sixty (60) days of the service from the City of a notice of such default, and to cure such default within a reasonable time, the Commissioner may, in lieu of exercising the right to terminate this Agreement in accordance with Section 40, and in addition to the right to regain possession by means of summary proceedings or any other method permitted by law, upon resuming possession, relet the premises without terminating this Agreement, or in any manner affecting the obligation of the Port Authority to pay, as damages, the amount herein covenanted to be paid as basic rental, in which event, however, there shall be credited to the account of the Port Authority the amount received from such reletting after deducting the expenses of such proceedings as may have been necessary in order to regain possession under this provision, as well as the costs of reletting the property; provided that the City, in the event of such reletting, shall do so on the most favorable terms and conditions commercially available; and the execution of a new lease of the premises regardless of the terms or provisions thereof, shall not terminate the Port Authority's liability or obligations under this Agreement, which shall remain in full force and effect for the full term of this Agreement.

42. RIGHT OF ENTRY

In the event that this Agreement shall be terminated as hereinbefore provided, or by summary proceedings or otherwise, or in the event that the premises or any part thereof shall otherwise be abandoned by the Port Authority during the term of this Agreement, the City or its agents, servants or representatives may immediately or at any time thereafter reenter and resume possession of the premises or such part thereof and remove all persons and property therefrom either by summary dispossession proceedings or by a suitable action or proceeding at law or by force or otherwise, without being liable for any damages therefor. Except for reentry following default, reentry by the City shall, however, be deemed an acceptance of a surrender of this Agreement.

43. DAMAGES AS RENT

In the event that the City reenters or takes possession of the premises in the manner or by the means provided or referred to in Section 41 of this Agreement, the amount of damages or deficiency shall become due and payable annually on the first day of the first calendar month of each year after the amount of such damage or deficiency shall have been ascertained in the manner provided in Section 41 of this Agreement, and separate actions may be maintained annually to recover the damage or deficiency then due, without waiting until the end of the term; and no notice or demand shall be necessary in order to maintain such action.

44. NO RIGHT OF REDEMPTION

The Port Authority expressly waives any and all rights of redemption granted by or under any present or future laws, whether in the event that the Port Authority is dispossessed or evicted for any cause or in the event that the City obtains possession of the premises, by reason of the violation by the Port Authority of any of the covenants and conditions of this Agreement or otherwise.

45. CONCESSIONS

The Port Authority shall provide such consumer services as shall be necessary, convenient and desirable to accommodate users of the marine terminal. In so doing, it shall apply the standards and procedures followed by the Port Authority in ensuring the provision of a high level of each appropriate kind of consumer services

at Port Authority terminal facilities. The Port Authority shall in its discretion, select the agents, contractors, tenants, licensees, permittees or other occupants who shall perform the consumer services at the marine terminal, provided that the Commissioner, within thirty (30) days after written notice to be given within ten (10) days of the selection of any such by the Port Authority, may disapprove any such, provided that such disapproval shall be in writing and shall be expressly based upon a report rendered to him either by the Police Commissioner, the Commissioner of Licenses or the Commissioner of Investigation, that under the statutes, ordinances or rules and regulations administered or enforced by such Departments, such entity selected is disqualified from performing the services proposed to be performed. In the event of disapproval the Port Authority will exercise its right of termination as to such concessionaire.

46. ADDITIONAL PIER

If at any time during the letting of the permanent premises the City notifies the Port Authority that it is about to accept a genuine offer to lease Pier 92 for a term of one year or more, the Port Authority shall have the right to lease the said pier, to be operated as part of the permanent premises, for the same term and at the same rental as shall have been offered.

47. ENTIRE AGREEMENT

This Agreement consists of pages 1 through 7, 7A, 8 through 19, 19A, and 20 through 30, together with Exhibits 1, 2 and 3. It constitutes the entire agreement of the City and the Port Authority on the subject matter and may not be changed, modified, discharged or extended, except by written instrument, duly executed by the City and the Port Authority.

IN WITNESS WHEREOF, the City and the Port Authority have caused this Agreement to be executed the date first above written.

ATTEST:

Morgan T. [Signature]

THE CITY OF NEW YORK

By William F. [Signature]
Acting Commissioner

ATTEST:

[Signature]
Assistant Secretary

THE PORT OF NEW YORK AUTHORITY

By [Signature]
Executive Director

APPROVED AS TO FORM

[Signature]
Corporation Counsel
W. H.

APPROVED AS TO FORM

[Signature]
General Counsel

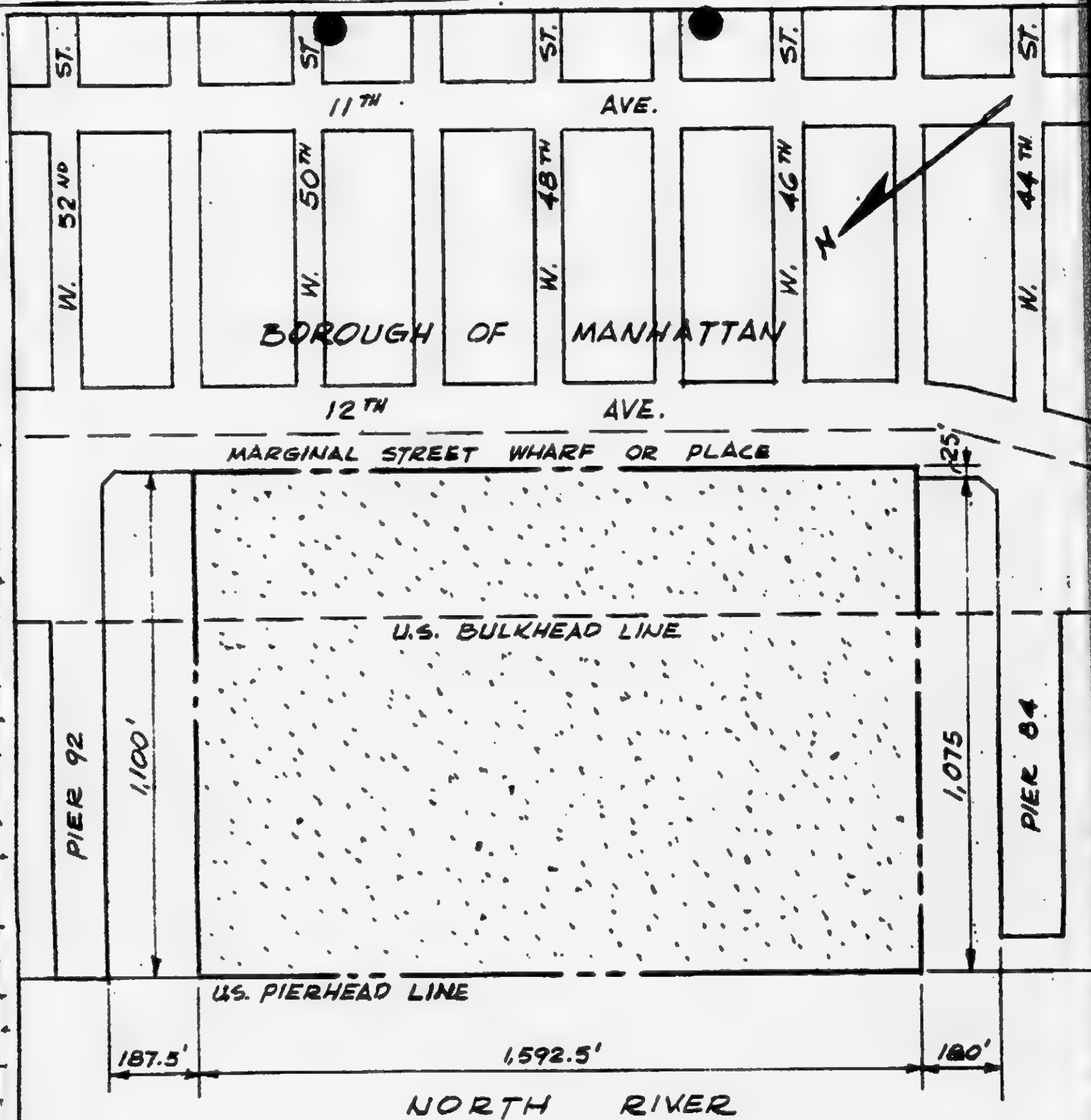
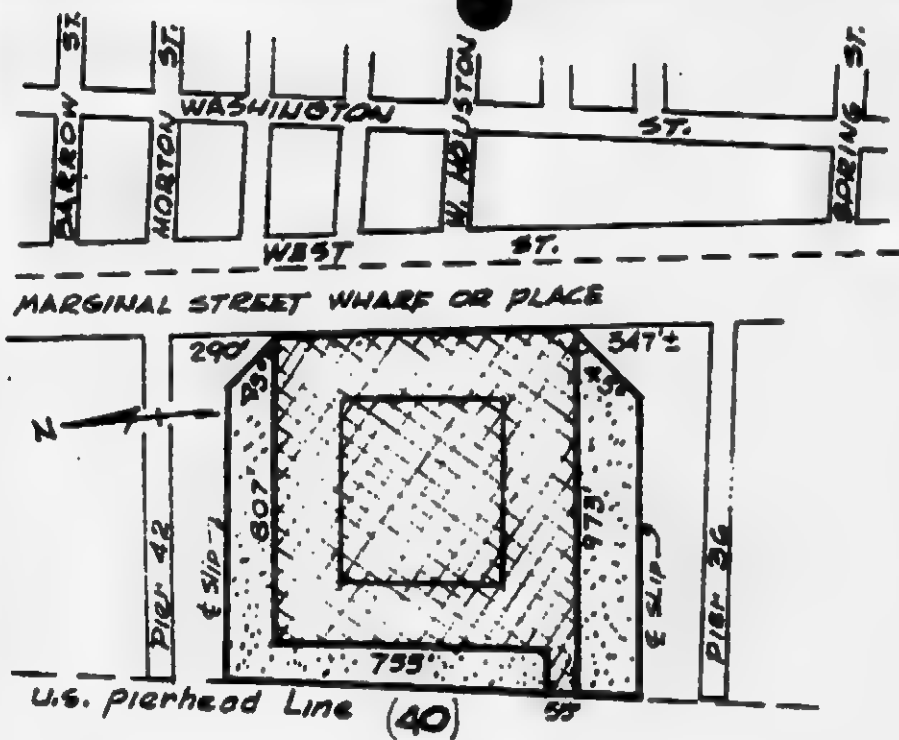
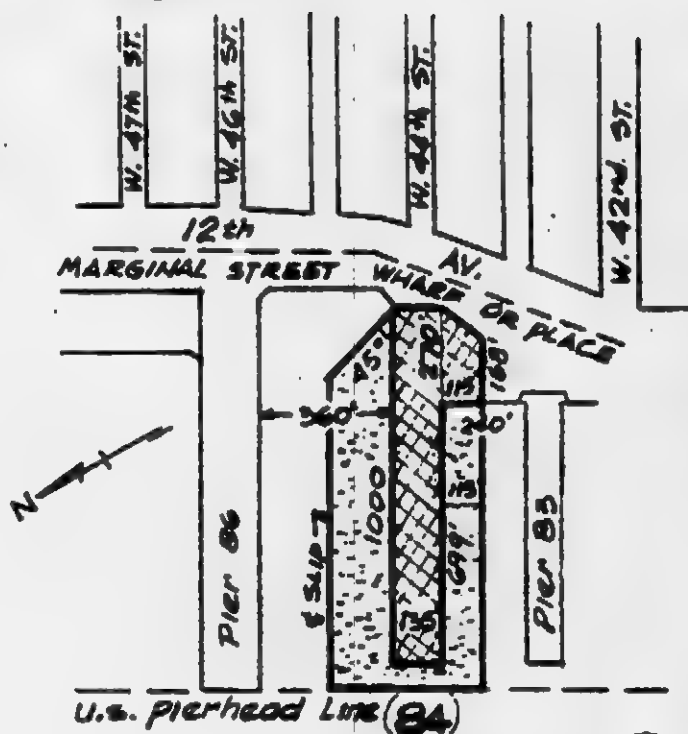


EXHIBIT-1
THE PERMANENT PREMISES

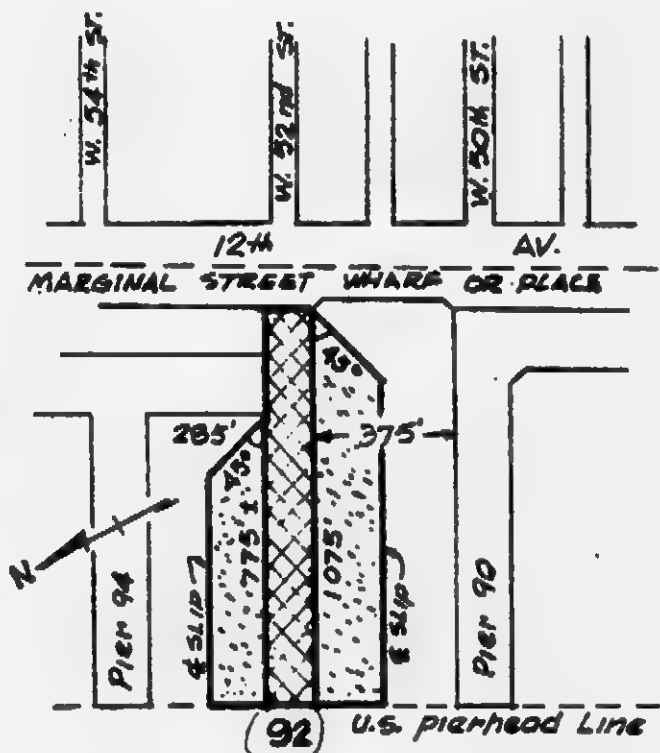
BOROUGH OF MANHATTAN



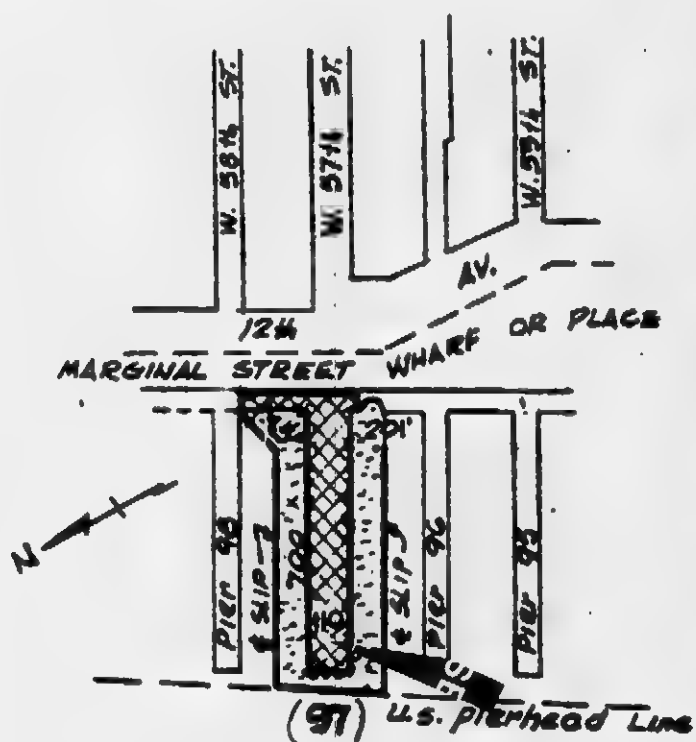
NORTH RIVER



NORTH RIVER



NORTH RIVER



NORTH RIVER

EXHIBIT 2

THE INTERIM PREMISES

Exhibit 3
In Thousands

Schedule of Rental Payments (1)

	<u>Guaranteed Rent to City (2)</u>		
	<u>Balance at Beginning of Year</u>	<u>Principal</u>	<u>Interest Assumed @ 5%</u>
1969	\$60,000		\$ 3,000
1970	60,000		3,000
1971	60,000		3,000
1972	60,000		3,000
1973	57,614	2,386	2,881
1974	55,246	2,368	2,762
1975	52,895	2,351	2,645
1976	50,563	2,332	2,528
1977	48,250	2,313	2,413
1978	45,033	3,217	2,252
1979	41,816	3,217	2,091
1980	38,599	3,217	1,930
1981	35,382	3,217	1,769
1982	32,165	3,217	1,608
1983	28,948	3,217	1,447
1984	25,731	3,217	1,287
1985	22,514	3,217	1,126
1986	19,297	3,217	965
1987	16,080	3,217	804
1988	12,863	3,217	643
1989	9,646	3,217	482
1990	6,429	3,217	320
1991	3,212	3,212	161
	<u>\$ -0-</u>	<u>\$60,000</u>	<u>\$42,114</u>
			<u>\$102,114</u>

(1) Based on assumption of commencement of term of entire permanent terminal within three years after January 1, 1969. If completion of entire premises is delayed the schedule is subject to adjustment of the annual payments of the basic rental required under Paragraph 4A to reflect (a) partial completion and (b) continued consequent deferral of part or all of component attributable to principal.

(2) Assumed initial bond issue of \$60,000,000 pursuant to Paragraph 3. This table of rental payments is subject to adjustment based on actual and final costs and shall provide for repayment as under Paragraph 4A.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:
CITY OF NEW YORK)

On this 17th day of January, 1969, before me personally came William F. Tobin, Acting Commissioner of the Department of Ports and Terminals of the Economic Development Administration, to me known and known to me to be the person described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same.

/s/ Roy H. Rudd
ROY H. RUDD
Notary Public, State of New York
No. 24-3392575
Qualified in Kings County
Term Expires March 30, 1969

STATE OF NEW YORK

COUNTY OF NEW YORK

ss.

On the 17th day of January, 1969, before me personally came Austin J. Tobin who, being by me duly sworn, did depose and say that he resides in New York, New York at 200 East 66th Street that he is the Executive Director of The Port of New York Authority, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Commissioners of the said corporation; and that he signed his name thereto by like order.

/s/ Albert J. Buckley

(notarial seal and stamp)

Notary Public, State of New York
No. 60-0479050

Qualified in Westchester County
Commission Expires March 30, 1969

STATE OF

COUNTY OF

ss.

On the _____ day of _____, 196____, before me personally came _____ who, being by me duly sworn, did depose and say that he resides in _____

that he is the _____

of _____

one of the corporations described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the board of directors of the said corporation; and that he signed his name thereto by like order.

(notarial seal and stamp)

I, MILDRED C. PORTH, the Assistant Secretary of THE PORT OF NEW YORK AUTHORITY, a body corporate and politic, created by compact between the States of New York and New Jersey with the consent of the Congress of the United States, hereby certify

THAT annexed hereto is a true and correct transcript from the Official Minutes of a meeting of The Port of New York Authority, duly held on the 14th day of November, 1968, containing the following resolution or resolutions:

Consolidated Passenger Ship Terminal

THAT (except as hereinafter stated) it appears from the Official Minutes of The Port of New York Authority that the said resolution or resolutions were duly and unanimously adopted by the Commissioners of The Port of New York Authority and are now in full force and effect.

No exceptions.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the Official Seal of The Port of New York Authority this 14th day of January, 1969.

/s/ Mildred C. Porth
Assistant Secretary of
The Port of New York Authority

RESOLVED, that the Executive Director be and he hereby is authorized acting on behalf of the Port Authority to enter into an agreement of lease with the City of New York covering the construction, and the leasing for a period of twenty years, of a passenger vessel terminal on approximately the site now occupied by Piers 86, 88 and 90, Hudson River; the Port Authority to construct the terminal and finance a portion of the cost thereof (\$4,100,000) estimated to be the value of the existing structures incorporated into the final structure and the capitalized value of site rental during construction with the City to finance the balance of approximately \$60,250,000 by a bond issue; the Port Authority to pay as annual rent the sum required each year to amortize the City's borrowings for construction purposes over a period of twenty years and to pay a portion of the excess, if any, of revenues over such payments and operating and maintenance costs, the Port Authority to operate and maintain the permanent terminal, publishing tariffs on an annual basis which shall be structured to return funds necessary to amortize construction, pay operating and maintenance costs and provide a reserve of not more than the total of the three highest years amortization amounts; further, the Port Authority to rent at existing rentals and for the period of construction only, or less as may be required for operations, Piers 40, 84, 90, 92 and 97, and to operate them or such of them as may be required, as an interim passenger vessel terminal during construction; the City and the Port Authority to undertake to permit no passenger vessel use of any facilities owned by or under their jurisdiction for a period to commence with the letting and to extend fifty years after the expiration of the original twenty-year term of the lease, or only so long as the new facility is being operated as a consolidated passenger ship terminal and is satisfactory for such business using or intending to use the Port of New York, whichever is the shorter; the Port Authority to have options for renewal in order to provide for recovery of deficits if existing, or to provide for possible extension, on a rental to be agreed upon; the agreement to be subject to the approval of the Federal Maritime Commission is required, and the form of the agreement to be subject to the approval of General Counsel or his designated representative; and be it further

RESOLVED, that the Executive Director be and he hereby is authorized acting on behalf of the Port Authority to enter into an agreement with the City of New York and steamship lines operating passenger vessels to the City of New York providing for use by the said lines of the interim terminal and of the permanent terminal, exclusive of all other facilities, and stating the terms of financing, construction and operation of the facilities including the bases for tariffs and adjustments thereof, with provision that under no circumstances will the total sum collected from steamship lines during the original 20-year term exceed \$20 per passenger; the agreement to be subject to the approval of the Federal Maritime Commission if required and the form thereof to be subject to the approval of General Counsel or his designated representative.

BOARD OF ESTIMATE

CITY OF NEW YORK

RECEIVED
Dec. 20 9:23 AM '68

ECONOMIC DEVELOP. ADMIN.
BATTERY MARITIME BUILDING

(Cal. No. 9-A)

Resolved, By the Board of Estimate, if executed within 60 days after the adoption thereof, that the Commissioner of the Department of Ports and Terminals, pursuant to Section 707a of the New York City Charter be and hereby is authorized to execute a lease, as follows:

Lessee-The Port of New York Authority, 111
8th Avenue, New York, N.Y. 10011

Use of Premises-(a) Permanent Premises:
Consolidated passenger ship terminal; and
(b) Interim Premises: For the use of all
passenger ships during the estimated three
year period of construction of the permanent
premises.

Premises-(a) Permanent Premises: A new
four-level, six-berth structure to be con-
structed on the site of existing Piers 86,
88 and 90, North River, Manhattan; and (b)
Interim Premises: Piers 40, 84, 92 and 97,
North River, Manhattan.

Term-(a) Permanent Premises: 20 years,
commencing on the first day of the calendar
month next following the completion of con-
struction of the two southerly finger piers
of the project, but not later than 48 months
after the commencement date of the lease for
the interim premises; and (b) Interim Premises:
Commencing on the day following surrender of
the interim premises by the present lessees,
and shall expire on the thirtieth day after
the completion date of the permanent premises.

Rental-(a) Permanent Premises:

Basic Rental-In accordance with a schedule
attached to the Lease, of rents sufficient to
amortize in 20 years the entire construction
cost plus debt service costs.

Additional Rental-Receipts over and above:
(1) the amount of the Basic Rental and (2) the
cost of operation and maintenance, will be dis-
bursed as follows: the first \$750,000 to the
City; the second \$750,000 to the Port Authority
Reserve Fund; any money remaining in the Reserve
Fund at the termination of the letting to be paid
to the City, plus interest.

Additional Payments to the City-(1)
Prior to the letting a lump sum of \$1,500,000
representing the residual value of the struc-
tures presently occupying the permanent premises,
and (2) the amount of \$2,579,131.68 as rent for
the permanent premises during the period of
construction, now estimated as three years.
(b) Interim Premises: \$1,821,451.75 per year

A true copy of resolution adopted by the Board of
Estimate on NOVEMBER 21, 1968.

/s/ Ruth W. Whaley

Secretary.

BOARD OF ESTIMATE
CITY OF NEW YORK

Received Dec. 20
9:23 AM '68

ECONOMIC DEVELOP. ADMIN.
BATTERY MARITIME BUILDING

(Cal. No. 9-B)

Resolved, That the Board of Estimate hereby authorizes the Commissioner of the Department of Ports and Terminals to execute agreements and terminate leases at piers 40, 84, 88 and 92, North River, Manhattan, presently in effect.

A true copy of resolution adopted by the Board of Estimate on NOVEMBER 21, 1968.

/s/ Ruth W. Whaley

Secretary.

BOARD OF ESTIMATE
CITY OF NEW YORK

Received
December 20
9:23 AM '68

ECONOMIC DEVELOP. ADMIN.
BATTERY MARITIME BUILDING

(Cal. No. 9-C)

Resolved, That the Board of Estimate hereby authorizes the Commissioner of the Department of Ports and Terminals to execute a companion agreement between The City of New York, the Port of New York Authority and Passenger Vessel Companies restricting all passenger vessel operations within the Port of New York to the proposed Consolidated Passenger Ship Terminal, North River, Manhattan.

A true copy of resolution adopted by the Board of Estimate on NOVEMBER 21, 1968.

/s/ Ruth W. Whaley

Secretary.

EXHIBIT 2

Exhibit 2

AGREEMENT

This AGREEMENT, made as of 1969 by and among (i) the CITY OF NEW YORK (hereinafter called "the City"), acting by its Commissioner of the Department of Ports and Terminals of the Economic Development Administration, (ii) THE PORT OF NEW YORK AUTHORITY, (hereinafter called "the Port Authority"), acting by its Executive Director, and (iii) the members of a group of steamship operators and agents, conducting seagoing passenger vessel operations to and from the Port of New York, such members being those persons, firms and corporations whose signatures or the signatures of whose appropriate officers appear subjoined to this Agreement, and being hereinafter collectively called "the Carriers,"

WITNESSETH, That:

WHEREAS, the City and the Port Authority have undertaken the effectuation of a plan and project in order to provide a modern terminal on the Hudson River shore of Manhattan Island for the use of seagoing passenger vessels; and

WHEREAS, the Carriers are desirous of cooperating with the City and the Port Authority in the fulfillment of this project and in the operation of the terminal to be constructed;

NOW, THEREFORE, the City, the Port Authority and the Carriers agree with relation to the passenger vessel terminal project, as follows, the agreements constituting mutual and interdependent covenants:

1. The City will provide, subject to and in accordance with a formal agreement to be entered into between the City and the Port Authority, and hereinafter called "the Basic Agreement," the financing of the construction of the new passenger vessel terminal. The City shall also cancel any existing leases and permits under which any of the Carriers may be obligated to make future rental payments. Present deferred maintenance obligations, if any, will be resolved promptly as between the City and the Carriers and appropriate arrangements for cancellation of pier leases and parking area leases or permits will be completed at the same time, if possible. "Passenger vessel" as used herein shall be as defined in the Basic Agreement.

2. The Port Authority will in accordance with the Basic Agreement, diligently construct and upon completion, operate the new passenger vessel terminal. The Port Authority will use its best efforts to complete construction of the new passenger vessel terminal at a construction cost presently estimated at \$60,250,000, as rapidly and as economically as may be practicable. The Port Authority shall during the period of

construction, operate certain existing pier facilities on the Hudson River shore of Manhattan Island for passenger vessel terminal use. The new passenger vessel terminal as and when constructed is hereinafter called "the Permanent Terminal" and the piers to be operated during the period of construction are all hereinafter collectively called "the Interim Terminal." The City and the Port Authority will lend their best efforts to the employment of Piers 84 and 92 as part of the Permanent Terminal whenever it appears from scheduling that such additional capacity is required.

3. The Carriers undertake, from the date of commencement of the letting under the Basic Agreement, to operate all their passenger vessel service to and from the Port of New York, whether directly or by agents, contractors, charterers or in any other indirect manner, only to and from the Interim Terminal, except as may be required by existing agreements, copies of which will be provided to the Port Authority, and upon completion of construction, to and from the Permanent Terminal only. The Interim Terminal piers shall include present Piers 40, 84, 90, 92 and 97. Operation of the Interim Terminal facilities will include the operation of presently associated parking facilities. Moreover, so long as the Permanent Terminal is (i) actually being operated so that the consolidated passenger vessel operations of the Port of New York are being handled there and (ii) remains safe, sound, and of sufficient capacity to handle all such vessels serving or desiring to serve the Port of New York and their passengers comfortably, conveniently, and in a manner consistent with the standards of passenger vessel terminal operation in the major ports of the world, and includes physical changes adequate to meet the requirements of industry-wide technological developments, the Carriers shall not make use of any pier, dock, wharf, bulkhead or other terminal of any type within the Port of New York for passenger terminal operations; but this covenant shall remain in effect for no more than fifty years after the expiration of the original term of the letting of the Permanent Terminal. Use of other facilities under emergencies shall not be deemed a breach of this obligation. Emergencies shall include unforeseen berthing delays, or delays in berth, due to strikes, work stoppages, delays in connecting transportation services, weather, acts of God, war or governmental order, or other conditions similarly affecting vessel movements. Of the costs incurred by Carriers by reason of the usage of other facilities in New York in emergencies of such character as incapacitate the Interim or Permanent Terminal for use, or make its use unreasonably difficult, only such costs of dockage and wharfage as are in excess of the costs normally incurred by all or substantially all Carriers utilizing the Interim or Permanent Terminal will be apportioned among all the Carriers operating at the Interim or Permanent Terminal. Such excess costs may, at the option of the Port Authority be credited against any present or future

amount owed by the Carrier having incurred such excess costs or remitted to the Carrier directly. Violation of this covenant by any of the Carriers shall subject such Carrier to payment of liquidated damages in the amount of the gross revenues which would have been earned by the Interim or Permanent Terminal (as the case may be) except for such violation. Use of Piers 84 or 92 when no berth is available in the Permanent Terminal shall not be a violation.

4. The Carriers recognize that the Interim Terminal will be operated by the Port Authority in part through agency agreements to be entered into between certain of the Carriers and the Port Authority to cover maintenance and allied activities, and all of the said Carriers and the Port Authority will cooperate in the negotiation and completion of such agency agreements as may be required by them and the Port Authority for the control by the Port Authority of passenger vessel terminal operations.

5. (a) All Carriers shall operate at the Interim Terminal on a tariff basis without leases, agreements or other arrangements covering any fixed term or area and all Carriers shall pay to the Port Authority the tariff charges for dockage, wharfage and other services, all as set forth in tariffs to be promulgated and published by the Port Authority and filed with the Federal Maritime Commission.

(b) In addition to the dockage and wharfage charges set forth in paragraph 5(a), for Permanent Terminal operations, the Carriers will collect and pay to the Port Authority fees in amounts prescribed by the Port Authority (to be collected by the Carriers from passengers in connection with the sale of tickets involving transportation to or from the Port of New York). The Carriers understand that with respect to Permanent Terminal operations the Port Authority will, in addition, collect revenues from parking, visitors to the Permanent Terminal and shops and other facilities operated by others with the permission of the Port Authority, at the Permanent Terminal.

6. Tariff charges for the Interim Terminal shall be designated to discharge all expenses of the operation of the Interim Terminal, (including no more than \$1,821,451.75 annually on account of the City's rent), the operation and maintenance of such facilities, and the Port Authority's proper administrative and overhead costs properly allocable to such Interim Terminal operations.

7. The Carriers acknowledge that revenues required for the construction, operation and maintenance of the Permanent Terminal will include (i) payments by the Carriers directly related to passenger vessel operations and (ii) incidental charges paid by others, available to the Port Authority because of other services and activities, at the Permanent Terminal being the charges described in paragraph 5(b) hereof other than passenger fees. The Carriers accept that, according to forecasts and studies prepared by the Port Authority, approximately 9/11ths of the total annual revenues will be derived from sources related to passenger vessel operations and that these sources are the charges contained in paragraph 5(b) hereof. The Carriers acknowledge that the revenue from the Permanent Terminal must be structured to meet the rental payments required of the Port Authority under the Basic Agreement and the operations and maintenance costs of the facility. Refunding over the twenty-year term under the Basic Agreement of the original capital cost is the principal factor in the basic rental payable under the Basic Agreement. The City acknowledges that use after the twenty-year lease term will be charged for on a rental or tariff basis which recognizes and takes into account the fact that the original capital cost of the Permanent Terminal will have been fully recovered at the end of the said term of the Basic Agreement. The Port Authority will publish the dockage and wharfage tariffs and will set the passenger fees annually. In any year the revenue provided from the Permanent Terminal will depend upon the rates in the various tariffs specified in paragraph 5 hereof, the number of ships calling, and the number of passengers using the facility. For the first year of Permanent Terminal operation, the Carriers accept that the tariff shall without prejudice be calculated upon a requirement of revenue from these sources in the estimated amount of \$8,750,000, and on an assumed 700,000 passengers. The Port Authority shall, in determining revenue required for each succeeding year, increase or decrease tariffs taking into consideration the estimated number of passengers, the estimated change in operational and maintenance costs on account of generally recognized economic factors as well as the change, if any, arising from an estimated increase or decrease in the number of passengers handled. The results of the previous year shall be a factor in the determination. The surplus, if any, of receipts from all operations at the Permanent Terminal held by the Port Authority after payment of rental to the City and operating and maintenance costs (all as defined in the Basic Lease) shall, pursuant to Section 4B(b) of the Basic Lease, be held for distribution to the users of the Terminal, such surplus to be a factor towards reduction of subsequent tariff charges. The Carriers undertake to pay on the basis of their use of the facility, all reasonable tariff charges and passenger fees as determined by the Port Authority. In no event will the Port Authority be entitled to tariff increases or passenger fees which will produce a total return to the Port Authority in revenue from the passenger vessel operations as paid

by the Carriers in excess of the sum of Twenty Dollars and No Cents (\$20.00) multiplied by the number of passengers actually utilizing the Permanent Terminal in any year.

8. This Agreement shall be null, void and of no effect unless and until the same shall have been approved by the Federal Maritime Commission, as may be required by law.

9. The Port Authority and the City will make no arrangement with operators of passenger vessels other than the Carriers, granting to such other operators any economic or other provisions more advantageous thereto than those contained in this Agreement. All operators of passenger service shall be acceptable as signatories to this Agreement. No operator of passenger vessels shall be permitted to utilize the Interim or Permanent Terminal except as signatories of this Agreement, or under other contractual arrangement having the identical effect as this Agreement. All such users of the Terminal shall, to the extent practicable as determined by the Port Authority, be accorded equal treatment as to occupancy of space, access to berthing facilities and other operations at the Interim or Permanent Terminal.

10. No Commissioner, officer or employee of either the City or the Port Authority, and no officer or employee of any Carrier, shall be held personally liable under this Agreement.

IN WITNESS WHEREOF, the City of New York, The Port of New York Authority and the Carriers have executed these presents, five pages with additional pages for signatories, as of the date first above written.

ATTEST:

THE CITY OF NEW YORK

By

Commissioner of the Department
of Ports and Terminals of the
Economic Development Administra-
tion

(Seal)

ATTEST:

THE PORT OF NEW YORK AUTHORITY

By

Executive Director
(Seal)

02569

CARRIERS:

ATTEST:

(Title) _____

AKTIEBOLAGET SVENSKA AMERIKA LINIEN

By _____

(Title) _____

(Seal)

ATTEST:

(Title) _____

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

By _____

(Title) _____

(Seal)

ATTEST:

(Title) _____

CANADIAN PACIFIC STEAMSHIPS LIMITED

By _____

(Title) _____

(Seal)

ATTEST:

(Title) _____

CHANDRIS LTD.

By _____

(Title) _____

(Seal)

ATTEST:

(Title) _____

COMPAGNIE GENERALE TRANSATLANTIQUE

By _____

(Title) _____

(Seal)

ATTEST:

(Title) _____

COMPAGNIE GENOVESE D'ARMAMENTO S.p.A.

By _____

(Title) _____

(Seal)

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02569

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(Seal)

ATTEST:

(Title) _____

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

By _____

(Title) _____

(Seal)

ATTEST:

(Title) _____

CANADIAN PACIFIC STEAMSHIPS LIMITED

By _____

(Title) _____

(Seal)

ATTEST:

(Title) _____

CHANDRIS LTD.

By _____

(Title) _____

(Seal)

ATTEST:

(Title) _____

COMPAGNIE GENERALE TRANSATLANTIQUE

By _____

(Title) _____

(Seal)

ATTEST:

(Title) _____

COMPAGNIE GENOVESE D'ARMAMENTO S.p.A.

By _____

(Title) _____

(Seal)

02569

CARRIERS (Cont'd)

ATTEST:

(Title)_____

ATTEST:

(Title)_____

ATTEST:

(Title)_____

ATTEST:

(Title)_____

ATTEST:

(Title)_____

ATTEST:

(Title)_____

THE CUNARD STEAM-SHIP COMPANY LIMITED

By _____
(Title)_____ (Seal)

DEUTSCHE ATLANTIK LINIE

By _____
(Title)_____ (Seal)

GREEK LINE, INC.

By _____
(Title)_____ (Seal)

MOORE-MCCORMACK LINES, INC.

By _____
(Title)_____ (Seal)

HOLLAND-AMERICA LINE

By _____
(Title)_____ (Seal)

NORDDEUTSCHER LLOYD

By _____
(Title)_____ (Seal)

02569

CARRIERS (Cont'd)

ATTEST:

DEN NORSKE AMERIKALINSE A/S

(Title) _____

By _____
(Title) _____
(Seal)

ATTEST:

SOCIETA per AZIONI DI NAVIGAZIONE
ITALIA

(Title) _____

By _____
(Title) _____
(Seal)

ATTEST:

HOME LINES INC.

(Title) _____

By _____
(Title) _____
(Seal)

ATTEST:

UNITED STATES LINES ,INC.

(Title) _____

By _____
(Title) _____
(Seal)

ATTEST:

UNIVERSAL CRUISE LINE INC.

(Title) _____

By _____
(Title) _____
(Seal)

ATTEST:

INCRES LINE AGENCY INC.

(Title) _____

By _____
(Title) _____
(Seal)

EXHIBIT 3

BEFORE THE
FEDERAL MARITIME COMMISSION

Exhibit 3

In the Matter of
FMC Agreements Nos. T-2271, T-2272

PROTEST OF MARINE SPACE ENCLOSURES, INC.

Come now Marine Space Enclosures, Inc. by their attorney
and show:

1. Protestants are a corporation doing business in the State of New York. Leading a consortium of prominent technical and production associates, they have in active preparation plans to construct on the waterfront of the City of New York a major complex of dwelling, hotel and office units, built over sub-aqueous parking, and ancillary facilities. Such plans include as an integral part construction of an advanced terminal for the world's great passenger liners. Planning officials of New York have in writing expressed "enthusiastic interest" in these plans, and preliminary consultations have begun. Protestants intend and expect to press forward actively and promptly.

2. Protestants have proposed that their complex should be constructed on the Hudson River between 46th and 49th Streets, New York City, but this site, though undoubtedly the most suitable, is not the only one at which it could be advantageously developed. An essential economic factor, however, is that

passenger vessels should be free to employ its constituent terminal.

3. The City of New York is the owner of waterfront facilities and land within its physical jurisdiction suitable for use as vessel terminals, including passenger vessels.

4. Historically, the City has constructed such terminals and leased them for operation to various terminal companies or vessel operators.

5. As of January 15, 1969, the City entered into agreements with the Port of New York Authority [FMC No. T-2271], and with the Authority and (apparently) 18 steamship operators and agents providing substantially all major known passenger liner service having terminus in New York [FMC T-2272], which agreements contain the following terms, among others:

(a) The City will finance and the Port Authority will construct at an estimated cost exceeding \$60 million, and thereafter the Authority will lease and operate, a new passenger-vessel terminal on the Hudson River in the area of West 45th - 51st Streets. The original term of lease of this terminal is 20 years [T-2271 par. 3]. Pending completion of this permanent structure, four existing piers at separated sites are to be leased to the Authority for operation as an interim terminal.

(b) The carriers agree that they will use the interim premises until the permanent terminal is ready, and that thereafter for 50 years after expiration of the original term of the lease of such permanent terminal, that is, for a period of

70 years, they will not (except in emergency) use any other terminal of any type in the Port of New York [T-2272 par. 3]. The City agrees to cancel existing obligations of these lines to use other of its facilities [T-2272 par. 1]. All passenger carriers may join in the agreement by becoming signatories, but none may use the facilities without so joining [T-2272 par. 9]. The City and the Authority promise never to authorize the use for passenger operations of any other property within their control, or to permit structures suitable for such operations to be provided anywhere in their jurisdiction, whether by new construction or alteration, the Authority agreeing to indemnify the City for any legal damages to which it may be adjudged liable on account of its refusal of such authorization or permission [T-2271 par. 31(a)]. They promise not for 70 years to promote, finance, establish, construct, operate or maintain any other passenger terminal facility, or to authorize any other person to do so [T-2271 par. 31(b)]; and they agree to exact an undertaking from all passenger-ship operators to use no other facility in New York [T-2271 par. 31(c)].

6. Under the terms of these agreements the City must and will deny to the protestants land, piers, wharves, work permits and licenses necessary to acquire, construct, reconstruct, operate or maintain passenger-vessel terminal facilities, which are an integral part of the development plans of protestants; and all passenger-ship operators, whether or not at present signatories of these agreements, will be penalized if they

patronize any such facilities of protestants located anywhere within the jurisdiction of the City or the Authority. The protestants are therefore effectually precluded from proceeding with their plans so far as they include and depend on a passenger-ship terminal.

7. Agreements Nos. T-2271 and T-2272 are agreements between common carriers and other persons subject to the Shipping Act, 1916 for the purpose of controlling, regulating, preventing and destroying competition among terminal operators to provide passenger facilities, and among carriers in the use of such facilities. The City undertakes to prevent any other terminal operator, existing or prospective, from furnishing, and to prevent any carrier from patronizing, any passenger facilities, existing or prospective, other than the exclusive facilities contemplated by said agreements. The carriers promise not to patronize any other facilities.

The object of these agreements is apparent. The motive of the City is to underwrite the huge investment it is about to make by compelling the exclusive patronage of all potential users. The motive of the lessee is to underwrite its obligation to the City, namely, to pay off the latter's investment with interest in 20 years, by compelling the exclusive patronage of all potential users. The motive of the carriers is to insure that if they must yield up exclusive patronage, no competitor shall now or hereafter be able to procure terminal facilities cheaper or better than those which the agreements will provide.

Compare Agreements No. T-2108, 2108A, 10 SRR 556 (Initial Decision 1968); Agreement No. T-2138, 10 SRR 571 (Initial Decision 1968).

These provisions, including those summarized in paragraph 5 hereof, will prevent the development of additional superior terminal facilities contemplated by protestants or by any other person, now and for 70 years, and may well discourage the wealth and variety of steamship services, including passenger services by sea, which have traditionally characterized the Port of New York and are essential for the health of that sector of our commerce, all to the detriment of the commerce of the United States and contrary to the public interest in violation of §15 of the Act. Further, they violate §15 in the respect that (a) they confer upon the Port Authority undue and unreasonable preference and advantage, and subject protestants to undue and unreasonable prejudice and disadvantage in violation of §16 First of the Act; (b) carriers, barred from using alternative facilities and penalized if they do so by absolute exclusion from the Authority's premises, will thereby be subjected to unjust discrimination and unfair treatment; and (c) such carriers will be subjected to undue and unreasonable prejudice and disadvantage in violation of §16 First. *Ballmill Lumber and Sales Corp. v. Port of New York Authority*, 10 SRR 131 (FMC 1968); cf. *Salveson v. West Mich. Dock*, 10 SRR 745 (FMC 1968).

8. So far as concerns the public-interest clause, the present status of the law, as enunciated by the Commission and the Supreme Court, is that agreements which on their face contravene the antitrust policy of the United States are presumptively contrary to the public interest within the meaning of §15. *FMC v. Svenska*, 390 U.S. 238 (1968); see Agreements Nos. T-2108, 2108A, *supra*; Agreement No. T-2138, *supra*. The practical effect of this presumption is that the proponents of such agreements must come forward with convincing evidence of special transportation conditions requiring the exemption of §15 to be extended to them. Agreement No. 8660 - Contract Rate System, 10 SRR 811, 817-818 (FMC 1969).

In the present case, the terms of the agreements erect a classical restraint of trade in a peculiarly pernicious form: no one is to be allowed to construct independent terminals; there is to be one terminal only, to be leased to one operator only, to the exclusion of all competitors, existing or potential; carriers are to be dragooned not merely by the physical fact that there will be no other terminal, but by an explicit promise of 70-years' exclusive patronage on pain of being excluded from that unique facility. That the parties well understand the dubious nature of their undertakings is shown by the clause under which the Port Authority indemnifies the City for any damages the latter may be found to have inflicted on independent interests in enforcing the agreements [T-2271 par 31(a)].

On their face, these agreements violate the antitrust laws, and are therefore presumptively contrary to the public interest within the meaning of §15. How heavy the burden will be of overriding this presumption, the cases cited above already show: the Commission has not looked with approval upon demands for exclusive patronage by terminal operators, including municipal authorities, where the only alleged justification (which can be urged in any trust violation) is the desire to protect an investment.

9. So far as concerns detriment to commerce, the agreements intend on their face to throttle development during 70 years of essential maritime facilities and to eliminate all independent sources of improvement from competition. The dangers to commerce are self-evident from so complete and so prolonged a suppression of the accepted market mechanism for commercial improvement. Nor is the danger theoretical or abstract: the terminal plans of the protestants are jeopardized here and now. The destruction of their project will be a concrete detriment to commerce proximately caused by the agreements, if they are permitted to go into effect. Here also the burden of justification will be heavy.

10. The prejudice and disadvantage to protestants are likewise self-evident, in the face of the unique and exclusive preference and advantage to be granted the Port Authority. Protestants are restrained from competing for the business of carriers with better or cheaper facilities such as they consider

they can furnish. Carriers are likewise disadvantaged by being compelled to forego alternative business opportunities, which might enable them or some of them to compete more successfully with one another or with air carriers, and by being compelled to use respondents' facilities, which there is reason to believe they consider to be outmoded before they are built.

WHEREFORE, protestants pray that Agreements Nos. T-2271 and T-2272 be disapproved as illegal on their face or in the alternative that they be set down for public evidentiary hearing in which protestants may participate as a party entitled to produce evidence and to examine and cross-examine witnesses. Los Angeles v. FMC, 388 F. 2d 582,583 (C.A.D.C. 1967), 8 SRR 20,082.

Respectfully submitted,

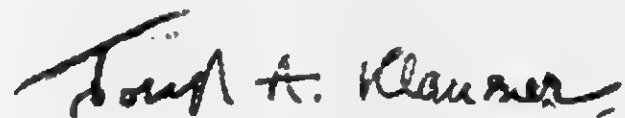


Joseph A. Klausner
Attorney for
Marine Space Enclosures, Inc.
1028 Connecticut Avenue, N.W.
Washington, D.C. 20036

March 11, 1969

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing first class mail, postage prepaid, a copy to each such party.



Joseph A. Klausner

Washington, D. C.

March 11, 1969

EXHIBIT 4

Exhibit 4

BEFORE THE
FEDERAL MARITIME COMMISSION
In The Matter Of
FMC Agreements Nos. T-2271, T-2272

PROTEST OF MARINE SPACE ENCLOSURES, INC.

The Port of New York Authority and The City of New York, for Answer to the above captioned Protest, say:

In paragraph 1 of its Protest, Marine Space Enclosures, Inc. discloses that its real interest in this matter is that of a real estate developer. Stripped down to its essentials, the Protest seeks to have the Commission deny approval to the filed agreements so that if protestant is, at some undisclosed future time, in a position to go forward with a possible development incorporating a ship terminal, it will be able to solicit occupancy thereof by the steamship lines who have already agreed to occupy the City/Port Authority Passenger Ship Terminal.

Although protestant is a "person" under the Act and, therefore, may well be entitled, as a matter of law, to file the instant protest, protestant is neither a carrier, a shipper, a receiver or another person subject to the Act.

The interest of protestant which would be served by the grant of the relief it seeks has nothing whatsoever to do with shipping -- what is at stake is solely protestant's desire to engage, on a profitable basis, in a possible real estate venture. To serve that interest, protestant asks the Commission to prevent the immediate construction of a Passenger Ship Terminal which is urgently needed now in the public interest. It is also essential to the carriers who have agreed to make use of it because they believe it will contribute in substantial measure to the economic well-being of their industry at the Port of New York. Most significant in this regard is the fact that no carrier has protested the filed agreements.

In view of the foregoing, and of the further reasons hereinafter set forth, we respectfully urge that the public interest requires that the Commission approve the agreements in question as promptly as possible.

BACKGROUND

The pending agreements comprise a program participated in by the City of New York, The Port of New York Authority and the steamship lines operating passenger vessels in the Port of New York, under which a \$60 million modern, six-berth passenger ship terminal would be constructed with public funds. The resolutions by the governing body of the City and by the Port Authority approving the project and the agreements are attached to the filed agreements.

The planning of the facility is complete and construction could commence early in April of this year. The details of need for the terminal and the plan to provide it to the public are set forth in the attached reports entitled "A Plan for a New Consolidated Passenger Ship Terminal in the Port of New York - April 1967" (Marked "A") and the "Supplementary Report - September 1968" of the same title (Marked "B"). The Carriers and their passengers would, on completion of the Terminal in 1972, enjoy modern, efficient, climate-controlled facilities which would be ideal for comfortable, expeditious handling of the vessels, their passengers and visitors. The Carriers would not be required to undertake long-term fixed lease commitments; they would pay dockage and wharfage and passenger charges on an as-and-when-used basis, under a uniform tariff established by

the operator of the Terminal, The Port of New York Authority.

The City itself has been, for the last seven years, seeking carrier cooperation in the development of a new terminal on a firm lease basis.

Over the past three years the Port Authority, the City and the steamship lines have been working to bring the project to its present position of early commencement of actual construction. Throughout these years of study and discussion, the City and the Port Authority have made it clear to the Carriers that the former City requirement that each user execute a firm lease could be rescinded only if the new facility were utilized as a terminal consolidating all of the Carriers' passenger ship movements to and from the Port of New York. Lacking this concept of consolidated operations, the terminal plan could not possibly be financially feasible and, therefore, could not be effectuated either by the Port Authority or the City of New York.

Since the Carriers who presently lease City-owned piers for passenger operations are unwilling to sign long-term leases necessary to permit upgrading of the present piers, without the plan for the Consolidated Passenger Ship Terminal, the existing drafty, dilapidated, decrepit passenger piers would have to continue in use indefinitely.

This bleak prospect was viewed as a potentially serious deterrent both to the continuance of passenger ship

operations in the Port of New York and to the efforts of the Carriers to develop additional traffic volumes. Certainly such a situation would operate to the detriment of the commerce of the United States and to the public interest.

The agreements and the plan were the subject of three public hearing in New York City in late 1968 and early 1969. The Carriers supported the project at these hearings. It was not until a hearing held in December, 1968 that the public officials of the City and the Port Authority received any notice from the Protestant here, Marine Space Enclosures, Inc., that it had developed an alleged alternate plan.

For reasons detailed below, the responsible City officials rejected Protestant's plan as an alternate to the Consolidated Passenger Ship Terminal.

THE PROTESTANT'S SCHEME

The Protestant, through its principal spokesman, Mr. William Zeckendorf, did not, at the hearing referred to above, come forward with any definitive plan for a facility combining ship terminal, housing, hotel, office and other uses in a single structure. A rendering was displayed at the public hearing held by the City Council of the City of New York. This rendering called for construction on the same site as that proposed as the site of the City/Port Authority Terminal, a site owned by the City in which protestant has no property interest of any kind. Based on this rendering, and other similarly sketchy information made available, primarily through press accounts, protestant's scheme appeared impractical. No cost estimates were provided, nor was there any information as to the cost to the carriers for use of the facility, nor has protestant revealed any vessel operating plan, proposed tariff or other indication as to proposed lease or other commitments contemplated to be made by the carriers.

The structure shown on the rendering could not possibly provide six berths of sufficient length to accommodate the industry's requirements in this Port. It also appears that the concept necessarily involves use of experimental underwater construction of dubious potential value.

As just one example, the protestant's submission referred to subaqueous parking. A previous attempt to provide subaqueous parking in a pier structure was most unsatisfactory.

Aside from the fact protestant had no title to or real estate interest in its proposed site, from the standpoint of City planning, the structure shown on the rendering could not be constructed on the proposed site without precluding a salutary relationship proposed (and possible under the public plan) between the new terminal and the contemplated development of the adjoining neighborhood. The private plan of the protestant was depicted as a tall structure effectively blocking the surrounding neighborhood from any orientation to the waterfront and the passenger ship activity. The magnitude of the structure, conceived by the protestant for the range and scope of activities contemplated, would impose severe traffic and other burdens on areas adjoining such a project. The rendering of the protestant shows no method for handling these severe problems.

Finally, and most important, the responsible City officials who reviewed the protestant's concept, determined that at least a year would be required to study

its feasibility and its ultimate construction could not be commenced, if at all, for several years. They determined that the ship terminal project could not be delayed for this period without abandoning hope for the new terminal required in the public interest.

Protestant now seeks to have this Commission further review his scheme, presumably with a view to a determination that it is "superior" to the City/Port Authority proposal. It is respectfully submitted that review of real estate development plans is not a function of this Commission under the Act.

ALLEGED ILLEGALITY

The Protestant contends that the agreements are in violation of the antitrust laws and therefore of Section 15. By the terms of that Section, however, if your honorable Commission approves these agreements they are "excepted" from the provisions of the antitrust laws. The attached reports ("A" and "B") detail the special transportation and related conditions which fully warrant the "exception" here.

With respect to any alleged undue and unreasonable prejudice to the Carriers, it suffices to note that the agreements under consideration expressly provide that each user will receive identical treatment. Any possible doubt on this score is obviated by the "most favored nations clause" set forth in Paragraph 9 of Agreement T-2272.

The Protestant misconstrues the effect of the agreements for it is erroneously asserted that "no one is allowed to construct independent terminals." There is nothing in the agreement to prevent a public or private developer from constructing a new passenger ship terminal on property not now under the control of the Port Authority or the City of New York.

Accordingly, any Carrier not wishing to sign the agreement with respect to the Consolidated Passenger Ship Terminal is presently free to seek out accommodations at other locations in the harbor not affected by the mutual covenants to cooperate, entered into by the parties to these agreements.

The Protestant further misconstrues the agreements in suggesting that the Carriers will be forced to use facilities at the new terminal which will be "outmoded." Section 3 of Agreement T-2272 releases the Carriers from the covenant to continue to use the Consolidated Passenger Ship Terminal whenever the City or the Port Authority has failed to make "physical changes adequate to meet the requirement of industry-wide technological developments."

Insofar as Protestant alleges prejudice and disadvantage to them by allegedly thwarting Protestant's scheme, this would seem to be a statement of alleged interference with private property rights. If so, it is not a matter within the cognizance of the Federal Maritime Commission. Furthermore, if actual damage can be demonstrated by the Protestant, it is to be presumed that it will pursue any judicial remedies available to it under the law.

Finally, in this connection, it must be noted that approval of these agreements is not the end of this honorable Commission's powers with regard to them. Under the Act, the Commission has continuing power, after notice and hearing, to require such changes therein as may be required to insure, inter alia, the protection of the public interest and of the commerce of the United States.

CONCLUSION

In view of the widespread public knowledge of the plan for the Consolidated Passenger Ship Terminal and its extensive consideration by the responsible local public officials, including those who presided at and participated in three public hearings, it is respectfully submitted that no additional hearing by this Commission is required at this time.

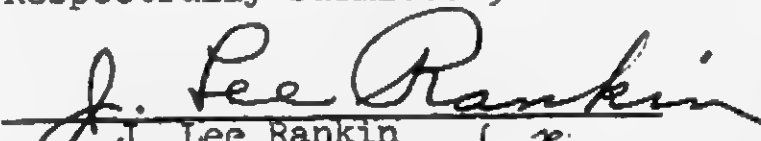
It is emphasized that no Carrier has filed any protest with your Commission.


An evidentiary hearing on protestant's factual assertions concerning the relative merits of protestant's potential and vaguely described proposal and the thoroughly developed project agreed upon by the City, the Port Authority and the steamship lines, both involving basically the same property, is beyond the scope of any violations alleged in the protest. It would relate entirely to the propriety of the City's recent rejection of protestant's proposal, and acceptance of the joint plan of the City and the Port Authority. Protestant has not justified an evidentiary hearing on any significant or material fact necessary to the Commission's determination under Section 15 -- a hearing would only result in critical delay of an urgently needed terminal facility.

The burden of protestant's other allegations is that the agreements, on their face, contravene antitrust policy and are, therefore, presumptively contrary to the public interest under Section 15. The special transportation conditions compelling the agreements at issue have been described above and in Attachments "A" and "B". The existence of these conditions completely dispel any presumption of illegality. Approval of these agreements would result in clear and positive benefit to the public interest and to the commerce of the United States in positive furtherance of the objectives of the Shipping Act.

For the foregoing reasons, it is urged that the protest is wholly lacking in merit with respect to matters within the jurisdiction of your Commission.

Respectfully submitted,


J. Lee Rankin
Corporation Counsel
The City of New York


for Sidney Goldstein
General Counsel
The Port of New York Authority

New York, New York
March 18, 1969

EXHIBIT 5

TELEGRAM RECEIVED BY TELEPHONE

TLX

EXHIBIT 5

177 THE SECRETARY

FN MAR 17 1112AEST

76 PDB 7 EXTRA

FEDERAL MARITIME COMMISSION 1405 EYE ST NORTHWEST

286 4480

ROOM 1101

DEST N

WASHDC

I AM INFORMED THAT THE PORT OF NEW YORK AUTHORITY

IS ENDEAVORING TO COMPEL PASSENGER LINES TO EXECUTE

FMC AGREEMENT T-2272 AND TO REQUIRE THEM TO

COMPLY WITH ITS PROVISIONS FOR MOVING THEIR TERMINALS

ON THREAT OF "DELAYS OR INCONVENIENCES".

THIS IS A CLEAR VIOLATION OF SECTION FIFTEEN AND

EXPOSES ALL PARTIES TO THE PENALTIES OF THE

ANTITRUST LAWS AND OF SECTION FIFTEEN FOR CARRYING

OUT AN UNAPPROVED AGREEMENT.

SIGNATURE

JOSEPH A KLAUSNER
COUNSEL FOR

MARINE SPACE
ENCLOSURES, INC.
1028 CONNECTICUT AVE
WASHINGTON DC

SUB.

BD SG
CFM FURN 25

SOCIAL REMINDER

YES

NO

WU 550 (RS-67)

Exhibit 6

BEFORE THE
FEDERAL MARITIME COMMISSION
IN THE MATTER OF
AGREEMENTS NO. T-2271, T-2272

SUPPLEMENTARY RESPONSE OF THE PORT OF NEW YORK AUTHORITY

The Port of New York Authority, to supplement its answer to the protest of Marine Space Enclosures, Inc., says:

By telegram dated March 18, 1969, the attorney for the Protestant accused The Port of New York Authority of endeavoring to compel passenger lines to execute Agreement T-2272. The telegram cites an alleged threat of "delays or inconveniences." It proceeds to assert that the alleged conduct violates Section 15 of the Shipping Act.

The undersigned has telegraphed his opinion to the Commission that there can be no violation of Section 15 of the Shipping Act by the present or prospective parties to the agreement because the agreement specifically provides that it shall be "null, void and of no effect unless and until the same shall have been approved by the Federal Maritime Commission, as may be required by law." (Paragraph 8)

The Port Authority now respectfully submits, in addition, that on the facts there has been no compulsion exercised by the Port Authority on the Carriers either to execute the agreement or to impose delays or inconveniences on those not wishing to utilize the terminal.

The Protestant's telegram in quoting the terms "delays and inconveniences", draws on a portion of a letter

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The Protestant's telegram in quoting the terms "delays and inconveniences", draws on a portion of a letter

transmitted by Mr. A. L. King, Director of Marine Terminals on February 20, 1969 to all passenger steamship lines who have indicated a desire to utilize the terminal but who had not as of February 20, 1969 executed the Carrier Agreement. A complete copy of Mr. King's letter is attached as Exhibit 1.

Mr. King's letter notes that it was then hoped that March 16, 1969 would be the date when the Port Authority's Interim Terminal operation commenced. Inasmuch as all of the addressees had received agreements, they were, of course, aware that the Interim Terminal operation could be commenced only pursuant to those agreements and that those agreements could not take effect unless and until they are approved by the Federal Maritime Commission. Mr. King's letter then reiterated what is expressed clearly in the agreements, that all Carriers desiring to utilize the Interim and Permanent Terminals must do so on the uniform terms and conditions stated in the agreement. He carefully noted that all agreements executed by the Carriers must be filed with the Maritime Commission and receive any necessary approvals.

His letter concludes with the request that the Carriers "kindly give attention as a priority matter to the execution of the agreement," noting the obvious fact that a Carrier wishing to utilize the Permanent Terminal who had failed to execute the agreement, would present an administrative problem for the Port Authority in light of its commitments

to persons who had signed the agreement that the terms and conditions of berthing at the Interim and Permanent Terminals would be identical for all users.

We respectfully submit that such a communication cannot be equated with compulsion.

Whatever doubt might nevertheless persist as to the matter of alleged compulsion, is completely dispelled, we believe, by subsequent events. Certain Carriers on receipt of the February 20 letter, dispatched a telegram to the Port Authority requesting deferment of the March 16 date for initiation of the project on the ground that they wished to discuss operating and financial matters with their principals who would be convened at Lisbon on March 10 at a meeting of the Atlantic Passenger Steamship Conference. The Deputy Executive Director of the Port Authority responded by telegram, a copy of which is attached hereto as Exhibit 2, in which he stated that the Port Authority would "withhold initiation of the project for three weeks beyond the March 10, 1969 Lisbon meeting." This telegram was dated March 1, 1969.

On March 11 and March 12, 1969, the Port Authority received executed copies of the agreement from the Norwegian-American Line and the Swedish-American Line. These agreements will be filed with the Federal Maritime Commission to supplement the filing of the copies previously executed by the Port Authority and the City of New York, United States Line, the Cunard Line and the French Line.

In addition, we have received a communication from the Managing Director of the Italian Line to the effect that Italian Line wishes to continue discussion of a design problem as to the length of the inner berths at the Permanent Terminal before it will execute the agreement. The Italian Line communication continues to stress its support of the project.

The Italian Line communication, copy of which is attached, amply demonstrates the inability of the Port Authority to impose requirements on the Carriers.

The agreements filed with the Commission point to the same conclusion. Agreement T-2271 expressly provides that the Interim Terminal operation cannot be commenced unless and until the present lessees of Piers 40, 84, 88 and 92 (Holland-America Line, American Export Isbrandtsen Line, French Line and Cunard Line) execute agreements of surrender of their leases to the City. (Paragraph 31e - p. 25) Thus, unless the present lease carriers surrender their leases to the City, the leasing of these piers for the Interim operation by the Port Authority cannot become effective. The Cunard and the French Lines have executed the Carrier Agreement but the Holland-America Line has not and none of these lines has executed a surrender of its lease. Accordingly, both the Port Authority and the City are powerless to proceed without the voluntary cooperation of all of these Carriers. That cooperation will

be evidenced by the deliberate choice on the part of these Carriers that they desire a new consolidated passenger ship terminal.

As to the Carriers who are not now lessees of City-owned piers, there is available to them the option of seeking berths at locations other than those owned or controlled by the Port Authority or the City of New York within New York Harbor. These include privately-owned waterfront on the North River, Brooklyn, Staten Island, and municipal and private property in Jersey City, Hoboken and other locations in New Jersey. The surrender of their leases by the present lessee-carriers to the City for future operation of those piers by the Port Authority does not, therefore, confront the non-lessee carriers with the sole alternative of dealing exclusively with the Port Authority for future berths in New York Harbor.

Their choice to use or not to use the present passenger ship piers on the North River will be determined, it is submitted, by their decision as to which course of action best serves the interests of their company and the industry. It is to be noted that the Norwegian Line and the Swedish-American Line which have executed Agreement T-2272, are in the non-lessee category at present.

The matter of requiring uniform treatment of all users of the Terminal and the concept that the Terminal must consolidate all of the passenger vessel operations in the

Port of New York have been basic to the studies and discussions participated in by the Carriers, the City and the Port Authority over the past three years. As early as August 1, 1966, the Shipping Digest, in an article describing the study of the Consolidated Passenger Ship Terminal, reported that Austin J. Tobin, Executive Director of the Port Authority, in a letter to Mayor Lindsay, dated July 14, 1966 had stated:

"For a consolidated terminal to function effectively, it must be used by all ships whose primary purpose is to carry passengers to and from New York."

On October 18, 1966, the Trans-Atlantic Passenger Steamship Conference issued a release as to the results of its annual meeting which had been held in Venice. The release stated:

"The Conference expressed great interest in the studies being pursued in New York at this time towards developing a new consolidated steamship passenger terminal. Keenly aware of the desirability of improving the pier reception facilities for visitors and returning residents, the hope was expressed that the current review would soon result in a definite recommendation."

On April 25, 1967, the Port Authority recommended to Mayor John V. Lindsay, a plan for improved passenger ship facilities. The report is Exhibit A to our submission to the Commission on March 18, 1969. The report reflected consultations with the passenger steamship lines which serve the Port of New York. It presented as the basic criterion, the need to provide new and improved facilities, adequate to handle all

of the present and future passenger ship movements in the Port of New York. It stated that, notwithstanding that it would not be feasible to continue the practice of leasing piers on a long-term contractual basis, the Port Authority believed it could be financed, constructed and operated on the required self-supporting basis. The method for achieving self support was stated to be a tariff of dockage and wharfage charges applicable uniformly to all passenger ship movements.

The plan was discussed with the Carriers at 1967 Conference meetings in Bermuda and London. And throughout the summer of 1968, a series of conferences with the principal United States representatives of all the Carriers was held, at which the City and the Port Authority detailed the proposed operating and financial plans.

In September, 1968, the Port Authority prepared a supplementary report (Exhibit B to our submission of March 18, 1969). It reported that its continuing studies led to the conclusion that the project could be considerably simplified thereby reducing costs and improving the economics of the project. The report expressly stated:

"As in the original proposal, it is assumed that the present practice of leasing piers on a long-term basis will be discontinued in favor of a system under which the ship lines will pay for the use of the terminal on a ship-by-ship basis according to an established tariff of dockage and wharfage charges. The City, the Port Authority and the ship lines would agree that any vessel in the passenger service calling at New York would be required to use the consolidated terminal."

This public report thus made clear that to the extent that it was within their power to do so, the Port Authority and the City planned and desired to centralize all passenger ship operations at the new facility.

The Port Authority and the City were then invited to attend a Trans-Atlantic Passenger Steamship Conference in Copenhagen on October 10 and 11, 1968. The proposed Carrier Agreement containing terms and conditions similar to T-2722 was distributed to each Carrier in advance of the meeting.

After two days of discussion at Copenhagen, the participating lines approved a joint statement:

"The member lines of the Atlantic Passenger Steamship Conference, as a group, have reaffirmed their general approval of the New York passenger pier proposal.

"The representatives of the City of New York, the Port of New York Authority, and the members of the Conference agreed to work together and to meet and solve the operating and economic problems which will face them in the realization of the project."

Intensive negotiations were then held with a committee of the Carriers as to all the details of the project and proposed agreements.

As a result of these discussions, on November 6, 1968, Mr. A. Lyle King, Director of Marine Terminals for the Port Authority, transmitted a revised agreement which included specific improvements requested by the Carrier committee. These reduced the costs to the Carriers by stretching the amortization

period from fifteen to twenty years, or reducing annual carrying charges by approximately \$620,000. The revisions requested by the Carriers included the addition of the most favored nations clause. This clause, of course, formalizes the principle that all users of the Terminal will be treated equally.

Simultaneously, the City and the Port Authority had been negotiating the terms and conditions of the lease between themselves governing the financing, construction and operation of the Consolidated Passenger Ship Terminal. (Agreement No. T-2271) A key provision of that agreement is Section 31 entitled "Consolidated Operations", under which neither the Port Authority nor the City may enter into any agreement with owners or operators of passenger vessels authorizing the use of other Port Authority or other City property for any operations in connection with passenger vessels. It also provides that the City and the Port Authority will not authorize others to construct any passenger vessel terminal facilities.

The mutual covenant not to compete extends for the period within which it is estimated that the new terminal will remain of utility to the Port and its users. With appropriate rehabilitation work being done, this period can extend for seventy years. However, neither the Port Authority, the City, nor the Carriers will be bound by this covenant if the terminal is permitted to become unsafe, unsound or of inadequate capacity.

Similarly, under the Carrier Agreement, if the terminal operator, whether it be the Port Authority or the City, in the future fails to adapt the terminal as required to meet industry-wide technological changes, the covenant does not bind.

The agreement by the Port Authority and the City to forbear from activities competitive with the Consolidated Passenger Ship Terminal follows two earlier public precedents. The first was the 1947 agreement between the City and the Port Authority, under which the Port Authority assumed responsibility for the development and operation of John F. Kennedy International and LaGuardia Airports. Section 10 of that agreement provides that neither the City nor the Port Authority will, itself, construct or operate airports competitive with LaGuardia and John F. Kennedy International Airports. It also provides that neither would authorize others to construct and operate competitive airports. The covenant continues for the term of the lease which will not expire until the year 2016.

In 1950, the Port Authority opened the Port Authority Bus Terminal which consolidates at a single westside site, all of the long-haul and commuter bus terminal operations in New York City. This facility was made possible in part through the adoption by the Board of Estimate of a resolution declaring that the City would not authorize construction or operation of any new bus terminals closer to midtown than the Port Authority Bus Terminal. This policy fortified the determination of the Port Authority and the City that intercity

bus operations and their terminals shall be confined to the peripheral areas of Manhattan.

To the best of our knowledge, every interstate long-haul carrier and every New York-New Jersey commuter carrier serving midtown New York City is a tenant at the Bus Terminal at present. Their agreements with the Port Authority specifically commit these carriers to use the Bus Terminal for all regular route operations to and from central Manhattan.

Such commitments from the users, just as is the case with the consolidated ship terminal, are the essence of the ability of the responsible public agency to provide consolidated or union terminal operations.

It is obvious that the Carriers understand the essentiality of the requirement that to the extent that the parties can do so, they will commit their efforts and activities solely to the public consolidated ship terminal. None of the Carriers have protested this requirement or any other provision of the agreements.

They have not done so before this Commission, nor have they done so at any of the three public hearings held in connection with the project in the City of New York. On the contrary, at the Board of Estimate hearing held on November 21, 1968, representatives of the American Export Isbrandtsen Lines, the Cunard Line, United States Lines, the Italian Line, North German Lloyd Line and French Line appeared in support of the

project. Before the Board of Estimate on that date, were four resolutions authorizing the City to enter into agreements 2271 and 2272. The Public Calendar for that Board of Estimate meeting described the agreements in detail. Thus, the Calendar states that one of the resolutions before the Board authorized "the Commissioner of Ports and Terminals to execute a companion agreement restricting passenger vessel operations to the proposed terminal."

At none of the three public hearings held by the City agencies was there any opposition expressed to the terminal, as such. Representatives of the International Longshoremen's Association expressly supported the passenger ship terminal, noting as well, that the City should similarly act to provide cargo-handling facilities on the North River.

The then Assistant Secretary of Transportation, Mr. Donald G. Agger, and the Regional Commissioner of Customs, Mr. Michael Stramiele, appeared in support of the project at the Board of Estimate hearing.

Cunard and the American Export Isbrandtsen Lines also supported the passenger ship terminal project at a public hearing held by the New York City Council in December of 1968.

At the City Council hearings, a key issue was whether the project should be delayed pending a study of the Protestant's alternate plan. The City Council voted unanimously to approve the passenger ship terminal project for immediate initiation, having been advised by the Chairman of the City Planning Commission and the Port Authority that the period required for study of the alternate plan would be so protracted that it was unlikely that either plan could ever become a reality. It was stressed to the City Council that construction costs are escalating rapidly and that the cost of municipal finance is also increasing. A delay of any significant period would inevitably add significantly to the presently estimated \$60,500,000 cost of the new terminal.

These same factors should be weighed by this Commission in determining whether or not to hold a hearing before permitting the initiation of this project. The Commission should also take into consideration the fact that local labor representatives have made preparations for the necessary manpower shifts which will occur when the Interim Terminal operation commences. Labor is ready to implement this plan promptly. A delay of as much as a month could disrupt these delicate and important arrangements.

It is respectfully submitted that the public interest urgently requires prompt favorable action by your honorable Commission on the pending agreements. The lack of any protest by a party with a genuine interest in the industry and the history of industry and public support for this project warrants speedy rejection of the protest.

Respectfully submitted,



Sidney Goldstein
General Counsel
The Port of New York Authority

Dated: March 21, 1969

CERTIFICATE OF SERVICE

I hereby certify that I have this day served
the foregoing Supplemental Answer to Protest upon Counsel
to the Protestant by mailing a copy thereof to his office
at 1028 Connecticut Avenue, N.W., Washington, D. C.
20036.

Patrick J. Falvey

New York, New York
March 21, 1969

THE PORT OF NEW YORK AUTHORITY
111 Eighth Avenue at Fifth Street, New York, N.Y. 10011

Marine Terminals Department

February 20, 1969

A. Lyle King, Director

Telephone 620-7412

To: All passenger steamship lines who have received agreements, except
Cunard Line, U. S. Lines, French Line

On February 20 the Port Authority filed with the U. S. Maritime Commission in Washington, Carrier Agreements executed by French Line, Cunard Line and U. S. Lines, and by The Port of New York Authority and the City of New York. We forwarded copies of this agreement to you on February 6 with a letter asking your company to execute the "Counterpart Execution Copy" and return it to me for filing. As of this writing we have not received the agreement from you.

March 16 at 12:01 a.m. has been designated as the target date for the termination of agreements now existing with the City of New York and various carriers in connection with Piers 40, 84, 86, 88, 90, 92 and 97. All ships requiring berthing space on any of these piers on and after March 16 must apply to the Port Authority for such space. The filing of an executed agreement with us, the subsequent filing by us with the Maritime Commission and any further approval then required by the Commission is necessary before a berth can be assigned. Will you kindly therefore give your attention as a priority matter to the execution of the agreement in order that you will not encounter any delays or inconveniences in docking your vessels when they arrive in New York on or after March 16.

For your further information, it is anticipated that Piers 86 and 88 will be vacated by March 16 and that berths will be provided by the Port Authority at Piers 40, 84, 90, 92 and 97.

Yours very truly,

A. Lyle King, Director
Marine Terminals

cc: Hon. William F. Tobin
Department of Ports & Terminals
City of New York

Exhibit 1

TELEGRAM

MARCH 1, 1969

YOUR TELEGRAM OF FEBRUARY 26, 1969 IS MOST DISAPPOINTING BOTH TO THE PORT AUTHORITY AND THE CITY OF NEW YORK AND THEIR EFFORT TO PROVIDE A MODERN AND EFFICIENT PASSENGER SHIP TERMINAL FOR THE COMFORT AND CONVENIENCE OF YOUR PASSENGERS.

YOUR ADVICE THAT INITIATING THE PROJECT ON MARCH 16, 1969 IS "UNACCEPTABLE" COMES OVER FOUR MONTHS AFTER THE ATLANTIC PASSENGER STEAMSHIP CONFERENCE AT COPENHAGEN APPROVED THE PROJECT IN PRINCIPLE. DURING THOSE FOUR MONTHS, MANY MEETINGS HAVE BEEN HELD WITH THE LINES' LOCAL REPRESENTATIVES AND THEIR COUNSEL. SUBSTANTIAL CONCESSIONS AS TO FINANCIAL MATTERS HAVE BEEN MADE BY THE CITY AND THE PORT AUTHORITY AS A RESULT OF THESE MEETINGS, DESPITE THE FACT THAT FROM THE INCEPTION OF OUR DISCUSSIONS, IT HAS BEEN CLEAR THAT THE ENTIRE RISK OF LOSS IS ON THE PORT AUTHORITY IF THE INDUSTRY IS UNABLE TO KEEP THE EXISTING VOLUMES OF ITS TRAFFIC IN NEW YORK.

THE PRESENT AGREEMENTS WERE THEN APPROVED BY THE BOARD OF ESTIMATE, THE CITY COUNCIL AND THE PORT AUTHORITY BOARD AFTER THREE PUBLIC HEARINGS. NO OPPOSITION TO THE AGREEMENTS WAS EXPRESSED BY YOU AT ANY OF THESE HEARINGS.

NO OTHER FINANCIAL MATTERS CAN NOW BE CONSIDERED BY THE PORT AUTHORITY OR THE CITY. THE ONLY POSSIBLE EXCEPTION WOULD BE

(more)

PAGE 2

A REQUEST BY A MAJORITY OF THE LINES TO REALLOCATE AMONGST THEM THE TOTAL COSTS WHICH MUST BE IMPOSED TO SUPPORT THE TERMINAL. BECAUSE A PUBLIC TARIFF FOR THE NEW TERMINAL MUST BE PROMULGATED TO COVER THESE COSTS, ANY SUCH REALLOCATION MUST BE BASED ON RATIONAL AND NON-DISCRIMINATORY STANDARDS.

WE ARE AWARE OF NO MAJOR OPERATING PROBLEMS WITH RESPECT TO THE PLAN AND HAVE BEEN RECEIVING YOUR COMMENTS ON DESIGN AND CONSTRUCTION. WE WILL CONTINUE TO DISCUSS OPERATING DETAILS AND THE CONSTRUCTION PLANS AS THE PROJECT PROCEEDS.

WHILE THE FOREGOING REVEALS THAT, FOR THE LINES WHO SINCERELY DESIRE TO REPLACE THE EXISTING DECREPIT AND UNCOMFORTABLE PIERS, THERE SHOULD NOW BE NO SUBSTANTIVE PROBLEMS WARRANTING THE ATTENTION OF PRINCIPALS, NEVERTHELESS, IN DEFERENCE TO YOUR PRINCIPALS, WE WILL WITHHOLD INITIATION OF THE PROJECT FOR THREE WEEKS BEYOND THE MARCH 10, 1969 LISBON MEETING OF THE ATLANTIC PASSENGER STEAMSHIP CONFERENCE. THE INTERIM TERMINAL PERIOD WILL THEREFORE COMMENCE AT 12:01 AM APRIL 1, 1969.

IN THE MEANTIME, WE ARE ASKING OUR BOARD TO PROMULGATE THE TARIFF FOR THE INTERIM PERIOD AND TO AUTHORIZE AWARD OF THE CONTRACTS FOR DEMOLITION.

THE FOLLOWING ARE RECEIVING THIS TELEGRAM: SWEDISH AMERICAN LINE, GREEK LINE, MOORE-MCCORMACK LINES, UNIVERSAL CRUISE LINE, INCRES LINE, HOME LINE, CHANDRIS LINES, CANADIAN PACIFIC, NORTH GERMINAL LINES, NORWEGIAN AMERICA LINE, ITALIAN LINE.

(more)

PAGE 3

THE FOLLOWING ARE RECEIVING COPIES OF THESE TELEGRAM
FOR INFORMATION ONLY: AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
CUNARD LINE, LTD., GERMAN ATLANTIC LINE, FRENCH LINE, UNITED
STATES LINES, COGEDAR LINE, HOLLAND-AMERICA LINE.

MATTHIAS E. LUKENS
DEPUTY EXECUTIVE DIRECTOR
THE PORT OF NEW YORK AUTHORITY
111 EIGHTH AVENUE
NEW YORK, NEW YORK - 10011

(end)

"ITALIA"-SOCIETA' PER AZIONI DI NAVIGAZIONE-GENOVA
ONE WHITEHALL STREET • NEW YORK, N. Y. 10004

IN REPLY PLEASE REFER TO:

March 20, 1969

SEGRETERIA G.M.

Mr. Matthias E. Lukens
Deputy Executive Director
The Port of New York Authority
111 Eighth Avenue
New York, N.Y. 10011

Dear Mr. Lukens:

On behalf of Italian Line, I have delayed replying to your telegram dated March 1, 1969 until after the Lisbon meeting referred to in the joint telegram from carriers dated February 26, 1969 and until I have had subsequent discussions with Italian Line, Genoa.

Ever since the Atlantic Passenger Steamship Conference in Copenhagen, Denmark in October of 1968, Italian Line has approved in principle the project for the proposed consolidated passenger ship terminal in New York City. Italian Line was the first major steamship line to hold a conference with the Port Authority for the purpose of resolving outstanding operating problems.

When the Port Authority requested Italian Line to appear before the Board of Estimate of the City of New York in November of 1968, Italian Line did so and stated:

"The Italian Line joins with other steamship companies and all those interested in better travel conditions in endorsing the principle of a modern, attractive, functional passenger facility for the world's greatest port. As a result, we have been pleased to participate in discussions and negotiations with the City of New York and the Port Authority for the purpose of trying to bring about the realization of the new, consolidated Passenger Terminal and, at the same time, resolve certain operating and economic questions and problems which face the Italian Line in connection with it."

Furthermore, Italian Line has taken the position that until its deferred maintenance obligation with the City of New York is resolved, it cannot execute agreements with the Port Authority covering either interim or future use of the permanent terminal. As of today, it seems likely that, as a result of Italian Line's consistent efforts, the deferred maintenance problem with the City of New York may be resolved.

It should also be noted that Italian Line was not given any effective opportunity to analyze in depth, comment on or make changes in the basic agreement between the City of New York and the Port Authority until that document was in such form that it could not be changed. Italian Line's views with respect to deferred maintenance reserves, contingency reserves and other substantial financial matters were never considered by the City or the Port Authority.

Furthermore because the consolidated pier facility will be operated on a user tariff basis, the entire cost of constructing, financing and operating the proposed facility will be borne by those carriers and their passengers who utilize the consolidated facility. Should the volume of use decrease, the charges which the Port Authority can levy upon the users would increase until a maximum ceiling on such charges is reached. Therefore, Italian Line, as a proposed major user, has a strong economic interest not only in the charges assessed against it and its passengers but also in the number of other carriers who will utilize this facility in the future.

We are not aware of any discussions with the Port Authority during 1969 with respect to a reallocation of total costs among the carriers who are expected to utilize the new facility. I would appreciate detailed information in this regard.

Your telegram indicates that you are not aware of any major operating problems in connection with the presently proposed plan. For several months, Italian Line has raised with the Port Authority a serious design problem with respect to the length of the middle finger pier and the inner berths of the other two finger piers. Although the Port Authority has attempted to redesign this middle finger pier and the inner berths of the other two finger piers, Italian Line is still of the opinion that berths of less than 1,000 ft. are impractical and may be unsafe in view of our present knowledge of ships which will require a berth length

./.

of at least 1,000 ft. The S.S. Michelangelo, the S.S. Raffaello of Italian Line as well as the S.S. United States, the S.S. France and the Queen Elizabeth 2 are presently known to fall in this category. In addition, the present design of the three finger piers provides for apron widths which are so great that serious docking problems may be caused especially when all berths are in use.

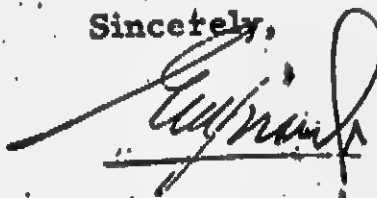
Italian Line has supplied the Port Authority with its detailed "Freight Requirements" at the proposed permanent facility. Only recently has Italian Line received a satisfactory response from the Port Authority with respect to a majority of its freight requirements.

A further question remains as to whether Italian Line will have an opportunity during the interim construction period to act as agent for the operation of Pier 90 on an economically sound basis.

Whether or not the problems mentioned here can be resolved on or before April 1, 1969 is a matter for which the City of New York and the Port Authority must bear prime responsibility at this time.

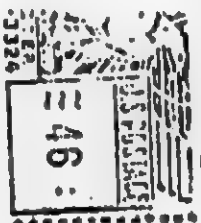
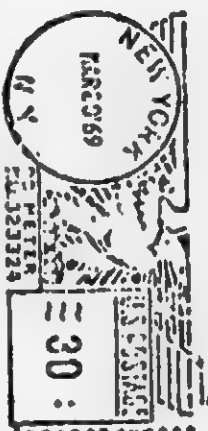
Italian Line sincerely desires to use a new and improved passenger facility in New York City. However, that facility must be available with, at the very least, the efficiency of the present operation at Pier 90 and be on a sound economic basis for Italian Line.

Sincerely,



Ottone Empoldi
General Manager U.S. and Canada

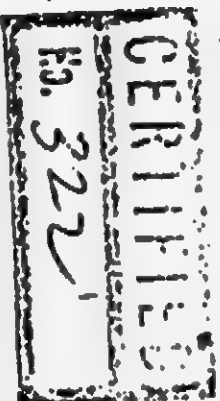
ITALIAN LINE
The Sunny Southern Route
to the Mediterranean
and all Europe



SPECIAL DELIVERY

Return Receipt Requested

Mr. Mathias E. Lukens
Deputy Executive Director
The Port of New York Authority
111 Eighth Avenue
New York, N.Y. 10011



RETURN RECEIPT REQUESTED

SPECIAL DELIVERY

EXHIBIT 7

Exhibit 7

BEFORE THE
FEDERAL MARITIME COMMISSION
In the Matter of
FMC Agreements Nos. T-2271, T-2272

REPLY TO SUPPLEMENTARY RESPONSE
OF PORT OF NEW YORK AUTHORITY

Since the Supplementary Response of the Port of New York Authority dated March 21, 1969 (copy of which was never received by this office but was furnished by the Commission's courtesy), which commences as a reply to Protestant's telegram of March 18, 1969, is in reality a further extensive defense of Agreements T-2271, T-2272, Protestant presumes that it may be heard in rebuttal.

1. Whether the Authority's letter of February 20, 1969, addressed to all passenger lines, represented an attempt to compel the lines to execute T-2272 can be gathered from its terms and from the subsequent events, for an account of which we are indebted to the Supplementary Response:

(a) The letter of February 20, 1969 announced a "target date" for termination of existing leases, and explicitly said: "All ships requiring berthing space on any of these piers on and after March 16 must apply to the Port Authority for such

space. The filing of an executed agreement with us, the subsequent filing by us with the Maritime Commission and any further approval then required by the Commission is necessary before a berth can be assigned. Will you kindly therefore give your attention as a priority matter to the execution of the agreement in order that you will not encounter any delays or inconveniences in docking your vessels when they arrive in New York on or after March 16." The letter concluded with advice that two major piers would be closed by March 16, so that berths would be available only at the five other interim piers.

We cannot read this document as an awkwardly worded adjuration to expedite execution because the project would otherwise be delayed pending Commission approval. Instead, it fairly laid down that after March 16 the Port Authority would be assigning pier space, and would do so only to signatory lines, and perhaps also only after Commission approval "if necessary." To close down certain piers, to cancel leases on the others, and to condition berth assignments for the interim terminal on execution of the agreement would clearly be to carry out paragraphs 1(b), 4 C, 31(a) [second sentence], (c), (d), (e) of T-2271 before Commission approval, notwithstanding the express terms of paragraph 36; and likewise as to paragraphs 3 [first two sentences], 4, 5(a), and 9 of T-2272. We submit that this is exactly what the letter of February 20 said would happen.

(b) It appears that the response from the lines was "most disappointing". So said a bitter telegram addressed to them by

the Port Authority on March 1, 1969 [Exhibit 2 to Supplementary Response], from which much interesting information can be gathered. So far as relevant to the present issue, however, in grudgingly agreeing to permit consultation of the lines with their principals, the Port Authority has repeated its intention to go ahead with the project entirely without reference to \$15. "... in deference to your principals, we will withhold initiation of the project for three weeks beyond the March 10, 1969 Lisbon meeting of the Atlantic Passenger Steamship Conference. The interim terminal period will therefore commence at 12:01 A.M. April 1, 1969. In the meantime, we are asking our Board to promulgate the tariff for the interim period and to authorize award of the contracts for demolition."

To the Port Authority, its "deference" may seem a sign of negotiating weakness. To us, it reads like a definite ukase intended to take effect at a minute certain. This it may not do.

(c) What has emerged from the new submission and its appendices is that as of the time the agreements were filed only three lines had executed T-2272, though signature spaces were shown for eighteen, all the existing passenger lines (including some known to have suspended operations). We suggest that this was a misrepresentation to the Commission. Surely it is inappropriate, to say no more, to imply that parties have contracted by a form of document which shows their names listed in an imposing sequence more than three pages long. Protestant was actually misled on this score, having supposed, perfectly naturally, that all parties shown must have agreed, and that only a

ministerial act of execution, delayed for some reason, remained to be performed. Now it seems that serious disagreements remain, and that even the physical attributes of the new terminal are in dispute. See Exhibit 3 to Supplementary Response, letter of Italian Line. What the City and the Port Authority have done, quite simply, is to imply they have final agreements with companies with which in fact they are merely negotiating.

We can scarcely understand such a procedure. It is common for conferences to provide that other unnamed persons may adhere to an agreement by complying with stated admission requirements. But it is unexampled to give a long list of companies which have not signed in a form that plainly implies that they have.

At the very least, the agreements are not ripe for approval before they are signed. We shall argue further that this is all the more the case when their proponents seem to be contending that they cannot be effective without exclusive patronage of all the lines. And it would still be true even if the Port Authority were so confident of compelling adherence by April 1 that it was prepared to break ground without it.

2. Both in its original and supplementary responses the Port Authority has made representations concerning the meaning of the two agreements which cannot be sustained from their text. For instance, the first response said: "There is nothing in the agreement to prevent a public or private developer from constructing a new passenger ship terminal on property not now under

the control of the Port Authority or the City of New York. Accordingly, any carrier not wishing to sign the agreement ... is presently free to seek out accommodations at other locations in the harbor not affected by the ... agreements." [10] The Supplementary Response specifies these locations as "privately-owned waterfront on the North River, Brooklyn, S.I., and municipal and private property ... in New Jersey." [5]

(a) To begin with, no carrier which executes T-2272 has any choice whatever. It agrees "to operate all ... passenger service to and from the Port of New York ... only to and from the Interim Terminal ... and ... to and from the Permanent Terminal only *** Moreover, ... [it] shall not make use of any pier, dock, wharf, bulkhead or other terminal of any type within the Port of New York for passenger terminal operations". [Par. 3] If it fails to sign, it is excluded from the existing as well as the new facilities. [Par. 9] This is as tight as it can be with respect to signatories.

A grave legal question presents at the threshold, whether persons other than carriers, even if subject to the Shipping Act, may employ an exclusive patronage contract. We contend that since *FMB v. Isbrandtsen Co.*, 356 U.S. 481 (1958) in effect outlawed exclusive patronage contracts even for carriers under §15, the Commission may authorize such a contract only under §14b, which applies solely to carriers in their relation to shippers of cargo. On the express point of law, the present case seems to be of novel impression in respect of a terminal operator,

although the Commission and its examiners have disapproved efforts in this direction on their merits. See cases cited in our Protest.

The issue is sharpened by the exceptionally severe form of contract exacted here. Paragraph 9 of T-2272 provides, as said, that "No operator of passenger vessels shall be permitted to utilize the Interim or Permanent Terminal except as signatories of this agreement." The ordinary exclusive-patronage contract never refuses service to nonsigners, although it demands a higher rate. Here the nonsigner is denied service. We contend that a terminal, like a common carrier, may not lawfully turn away an applicant for service for refusing to bestow all his business there.

But apart from these extremely serious legal questions, which go to the heart of the Shipping Act, how can it be asserted that a competitive terminal can be developed when the carriers whose business is essential to such an enterprise are precluded from patronizing it? The Port Authority says that despite the penalties for not signing, namely, total exclusion from its projected facilities, carriers need not sign, and may therefore be free to patronize others. Practically, of course, the closing down of all terminals now available and the limitation on use of interim facilities to signatories would, if permitted, constrict the class of such independents to the vanishing point; for competitive facilities could not be constructed rapidly enough to serve them immediately, and they are faced

with eviction on April 1, 1969.

(b) Is it true, moreover, that "there is nothing in the agreement to prevent a public or private developer from constructing a new passenger terminal not now under the control of the Port Authority or the City of New York"?

It must be observed that this statement implies an assertion of fact that there are facilities in New York harbor (specified in the Supplementary Response as being in various parts of the City, including along the Hudson River, as well as in New Jersey) which are not within the control of the City or the Authority. We demand proof of this assertion on the factual side, having understood, for instance, that the City owns all but two piers on the Hudson, obviously the most desirable situs.

On the legal side, we call attention (as we did in our Protest) to Paragraph 31 of T-2271: "... neither the City nor the Port Authority will issue any work permit or other construction approval or consent whereby structures suitable for such [passenger] operations may be provided whether by alteration of existing structures, or by new construction, anywhere within the jurisdiction of the City or the Port Authority." Assuming that there is privately-owned property suitable for terminal use within New York, is it seriously asserted that under New York law it may be so developed without work permits or construction approvals from the City? Of that somewhat improbable condition we demand proof. If it cannot be proved, the suggestion

of freedom to construct is without foundation. The Supplementary Response is franker in admitting (p. 9) that the intention is that "the City and the Port Authority will not authorize others to construct any passenger vessel terminal facilities." [Emphasis supplied.]

What conditions may be in New Jersey is not, with great respect, a matter of concern to Protestant. Its plans call for construction in New York, preferably along the Hudson. It has the right to challenge the legality of the clauses that affect it directly. It expects to prove also that the Hudson is essentially the practical area for passenger-terminal development, and not the other areas to which Respondents would relegate it and others.

We remind the Commission that it is this provision of T-2271 which has obviously most worried the City, for it has exacted indemnification from the Port Authority for legal damages it may perpetrate against owners of private property by withholding work permits under §31. When the parties themselves thus signal the legally dubious aspect of their agreements, others who are affected may challenge it before the Commission.

3. The two responses seem to consider that the transportation need justifying approval under §15 is more or less self-evident, so much so that they even suggest that no hearing is required. One page in each of the papers is all that is vouchsafed on this critical subject.

(a) The idea that hearings by the City Board of Estimate or other similar bodies can satisfy §15 is not, we presume, seriously advanced. Congress has not authorized the Commission to delegate its statutory functions to New York or to the Port Authority. It is also obvious, contrary to assertions in the responses, that the questions before these agencies were not Shipping Act questions. No one is asking the Commission to decide who should build what kind of terminal where. The Commission is being asked by the proponents to approve, and by Protestants to disapprove, agreements that must be measured against the standard of their effect on competition and commerce: to say whether these agreements, which contemplate certain facilities to be built by certain parties, offend against §15 by what they provide respecting who shall use the facilities and respecting whether competitive facilities may be constructed. It is precisely the answers that the "responsible local public officials, including those who presided at and participated in three public hearings," gave to these questions which the Commission is called upon by law to review entirely independently on its own record.

(b) The quite casual justifications for approval that are advanced seem to comprehend the following:

First, we are referred to two promotional brochures [Exhibits A, B to first response], with no guide to the material deemed significant. The brochures show very little more than that it is very cold on cold days in winter and very hot on hot.

days in summer at existing New York terminals, and that the plan for remedying this unsatisfactory condition has undergone a remarkable shrinkage in scale between the writing of the two documents. We may also notice that according to Exhibit 3 to the Supplementary Response, the plan is considered by the single most important transatlantic carrier to contain so serious a design problem, that the terminal may actually be unsafe for the five great passenger ships of the world, to say nothing of other docking problems arising out of dimensional characteristics. At best, the material suggests that a new terminal, and (subject evidently to some dispute) perhaps the proposed terminal, may be a desirable improvement upon existing facilities. There is no showing of need for clauses on their face utterly destructive of competition by possible competitive terminals and unjustly discriminatory between carriers.

Second, a halfhearted argument is made that delay even for a hearing may entail rising construction and financial costs. This is, of course, pure conjecture at this stage. It is not outside human experience that contract prices can be fixed, for instance. In any case, the Shipping Act does not purport to underwrite the costs of inflation. The damages to commerce that may be inflicted by an unlawful combination can quite easily outweigh the costs of construction even of a desirable new facility. Nor can it be seriously argued that such costs represent a transportation need justifying clauses otherwise violating the antitrust laws: in what meaningful sense can it be said that

exclusive patronage and the stifling of terminal competition must be accorded for 70 years because otherwise construction costs will rise? The Respondents must prove transportation need for such clauses, not that it may cost them time and money to prove it.

Third, it seems to be contended that the clauses are justified because bus and air terminals in New York have employed them. The short answer is that such precedents, about which, of course, we have no information beyond the Supplementary Response, have no standing before the Commission under the Shipping Act. Whether they have value even as analogies cannot be determined without a record in which they are carefully analyzed; and one suspects that most examiners would regard an excursus into their details as painfully enlarging the scope of any proper hearing before the Commission.

Finally, a single sentence in the Supplementary Response (p. 11) says that clauses such as are here assailed "are the essence of the ability of the responsible public agency to provide consolidated or union terminal operations". If this implies that the proposed terminal cannot succeed without exclusive patronage or against competition, it is obvious that, assuming the particular terminal is proved to be a facility essential to commerce, a very heavy burden falls on the Respondents to prove the truth of this proposition. Not only is there no proof of it, but it is not even explicitly asserted; it must be deduced from the ambiguous phrases quoted. In two recent

cases cited in our Protest, where terminals have sought something resembling exclusive patronage, the Commission's examiners have rejected this argument.

CONCLUSION. Respondents have made no case for approval, let alone for approval without hearing on the grave issues their application presents. Their agreement has not been executed by more than a small fraction of the projected signers. There are evidently serious objections to the design itself, which we have no right to suppose will be arbitrarily overridden. No justification for an exemption from the antitrust laws has been advanced that is cognizable under §15. Moreover, there is grave doubt whether the Commission may accord exclusive patronage to noncarriers at all under §15.

The presence of so many serious questions of fact and law in any case requires the Commission to order the statutory hearing.

Respectfully submitted,



Joseph A. Klausner
Attorney for
Marine Space Enclosures, Inc.
1028 Connecticut Avenue, N.W.
Washington, D. C. | 20036

March 27, 1969

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing first class mail, postage prepaid, a copy to each such party.



Joseph A. Klausner

Washington, D C.

March 27, 1969

EXHIBIT 8

Exhibit 8

BEFORE THE
FEDERAL MARITIME COMMISSION
In the Matter of
FMC Agreements Nos. T-2271, T-2272

COMMUNICATION

Please take notice of the attached letter of Protestant,
addressed to the Mayor of New York City in connection with
the above entitled matter.

Respectfully submitted,

Joseph A. Klausner

Joseph A. Klausner
Attorney for
Marine Space Enclosures, Inc.
1028 Connecticut Avenue, N.W.
Washington, D. C. 20036

April 8, 1969

GENERAL PROPERTY CORPORATION

383 MADISON AVENUE

NEW YORK, N. Y. 10017

PLAZA 9-7800

7 April 1969

The Honorable John V. Lindsay
Mayor,
The City of New York

Re: Proposed Passenger Ship Terminal
46th/50th Streets, Hudson River, New York

My dear Mayor Lindsay:

Approximately ten days ago, this writer suggested to the Acting Commissioner of the Department of Marine and Aviation, Honorable Charles Leedham, Esquire, that in the interest of expediting the implementation of a Passenger Ship Terminal at the above-captioned location, a stipulation be entered into between the parties to certain litigation before the Federal Maritime Commission, pursuant to which Marine Space Enclosures, Inc. will withdraw any objection to immediate construction.

This was predicated upon the further agreement that a full hearing and consideration of the legal aspects pertinent to the contract between the City and the Port of New York Authority be conducted by the Federal Maritime Commission. To date, no response to this suggestion has been received from the City.

We have been impressed by the frequent statements made by various City Authorities with respect to the "urgency" of the earliest possible construction date. For this reason, we seek to eliminate any delay which might be attributed to the present law suit.

This letter is being written in order to bring the matter to your attention so that in future, it cannot truthfully be alleged that Marine Space Enclosures, Inc., the litigant, is seeking anything other than a legal determination as to whether or not the contract entered into between the City and the Port of New York Authority is a lawful one.

Respectfully yours,

WZ:mac

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

637

No. 22,936

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 25 1969

Nathan J. Paulson
CLERK

MARINE SPACE ENCLOSURES, INC.)

Petitioner)

v.)

FEDERAL MARITIME COMMISSION)

and)

UNITED STATES OF AMERICA)

Respondents)

PETITION FOR REVIEW

BRIEF FOR PETITIONER

Joseph A. Klausner
Joseph A. Klausner
Attorney for Petitioner
1028 Connecticut Avenue
Washington, D. C. 20036

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Appendix

Exhibit A

BRIEF OF PETITIONER

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the Federal Maritime Commission was empowered to overrule petitioner's protest and such petitioner's formal demand for an evidentiary hearing, and without hearing evidence or legal argument to grant summary approval under §15, Shipping Act, 1916, 46 U.S.C.A. §814, to agreements whose terms for 73 years preclude construction, maintenance and operation of any passenger-ship terminal in New York other than the single terminal contemplated by such agreements, and require all passenger carriers to patronize such terminal exclusively during the same 73 years or be entirely deprived of its services.

B. Whether on the merits the Commission lawfully approved such agreements, or whether it should have disapproved them as (1) unjustly discriminatory and unfair as between carriers, (2) detrimental to the commerce of the United States, (3) contrary to the public interest, and (4) in violation of §16 First of the Act, all contrary to said §15.

II. STATEMENT OF THE CASE

1. This is a petition to review a final order of the Federal Maritime Commission entered pursuant to §15, Shipping Act, 1916, 46 U.S.C.A. §814, granting approval (carrying exemption from the antitrust laws) to certain agreements described below.

Jurisdiction and venue repose in this Court under 28 U.S.C.A. §2342 and §2343 [1969 Pocket Part]; 5 U.S.C.A. §702 and §703.

2. Petitioner is a New York corporation. As part of a complex structure to be developed by new construction methods above and below surface on New York City water-front property, it desires to construct and operate a terminal for passenger ships. It had originally proposed this complex to the City authorities for the area on the Hudson River between West 45th and 51st Streets. Other property, however, is also suitable, including a large terminal in Staten Island, among the largest privately held terminals in the City, owned by one of petitioner's affiliates, where passenger operations are deemed feasible as part of the complex such affiliate is planning for this site. Petitioner is also engaged in negotiations with other private owners of property suitable for the purpose in the City, and the City itself has invited consultation with petitioner respecting a site for a river-front airport which petitioner considers could also, but

for the circumstances hereinafter described, incorporate a passenger-ship terminal.

3. As of January 15, 1969, the City of New York entered into agreements with the Port of New York Authority (FMC T-2271, Exhibit 1 hereof), and with the Authority and (apparently) 18 steamship operators and agents^{1/} providing substantially all major known passenger liner service having terminus in New York (FMC T-2272, Exhibit 2), which agreements contain the following terms:^{2/}

(a) The City will finance and the Port Authority will construct at an estimated cost exceeding \$60 million, and thereafter the Authority will lease from the City and operate, a new terminal for passenger vessels on the Hudson River in the area of West 45th - 51st Streets. The original term of lease of this terminal is 20 years (T-2271 par. 3, Exhibit 1, p. 4). The basic rent is fixed to amortize the City's investment, with interest, within such original term; and the first \$750,000 of each year's profits is to be paid as additional rent (id. Par. 4A, B, Exhibit 1, p. 7A). Pending completion of this permanent structure,

1. We learn from the Commission's order under review that six lines had executed the agreement as at April 10, 1969. Exhibit A, p. 2 note 1.

2. For the Commission's statement of the terms of these agreements, see pp. 1-3 of its order, Exhibit A.

estimated to take three years, four existing piers at separated sites are to be leased to the Authority for operation as an interim terminal. Passim.

The City and the Authority agree to cancel all existing leases to use other of their present facilities within 30 days where possible (T-2271 par. 31, Exhibit 1, p. 23). They promise not for 50 years after the primary term expires to authorize the use for passenger operations of any other property within their control, or to permit structures suitable for such operations to be provided by any person anywhere in their jurisdiction, whether on public or private property, and whether by new construction or alteration, the Authority agreeing to indemnify the City for any legal damages to which it may be adjudged liable on account of its refusal of such authorization or permission (T-2271 par. 31(a), Exhibit 1, p. 23). They promise not for 70 years to promote, finance, establish, construct, operate or maintain any other passenger-ship terminal facility, or to authorize any other person to do so (T-2271 par. 31(b), Exhibit 1, p. 24); and they agree to exact an undertaking from all passenger-ship operators to use no other facility in New York City (T-2271 par. 31(c), Exhibit 1, p. 24).

(b) The carriers agree that they will use the interim premises until the permanent terminal is ready (approximately three years from now), and that thereafter for 50 years after the expiration of the original term of the lease of such terminal,

that is, for a period of 73 years in all, they will not (except in emergency) use any other terminal of any type in the Port of New York (T-2272 par. 3, Exhibit 2, p. 2). All passenger-ship operators may become signatories of the agreement, but no operator may utilize either the interim or the permanent terminal without becoming signatory (T-2272 par. 9, Exhibit 2, p. 5).

4. By their terms these agreements required the approval of the Commission under §15 of the Act. Notice of their filing was published in the Federal Register on February 28, 1969, page 3639, with 12 days allowed for comment by interested persons. Petitioner and an affiliated company filed such a comment, as apparently did others, as we learn from the order under review (Exhibit A, p. 3 note 2), although petitioner was not served or invited to reply thereto.

5. Petitioner's comment (Exhibit 3) was a protest against approval of the agreements, with a formal request for public evidentiary hearing. In substance, petitioner as the protestant alleged an interest in the construction of a competitive passenger-ship terminal and that effectuation of the agreements would immediately and for 73 years destroy all right of entry into the terminal field. Protestant contended that the agreements should not be approved because:

(1) Their terms are contrary to the public interest, in violation of §15, Shipping Act, 1916, 46 U.S.C.A. §814 (Appendix),

in erecting a classical restraint of trade of peculiarly pernicious form: no one is to be allowed to construct independent terminals; there is to be one terminal only, to be leased to one operator only, to the exclusion of all competitors, existing or potential; carriers are to be dragooned not merely by the physical fact that there will be no other terminal, but by an explicit promise of 73-years exclusive patronage on pain of being excluded from that unique facility.

(2) They will prevent the development of additional terminal facilities contemplated by protestant or by any other person, now and for 73 years, and may well discourage the wealth and variety of steamship services, including passenger services by sea, which have traditionally characterized the Port of New York and are essential for the health of that sector of our commerce, all to the detriment of the commerce of the United States in violation of §15 of the Shipping Act.

(3) Further, they violate §15 in the respect that (a) they confer upon the Port Authority undue and unreasonable preference and advantage, and subject protestant to undue and unreasonable prejudice and disadvantage in violation of §16 First of the Act; (b) carriers, barred from using alternative facilities and penalized if they do so by absolute exclusion from the Authority's premises, will thereby be subjected to unjust discrimination and unfair treatment; (c) such carriers will be subjected to undue and unreasonable prejudice and

disadvantage in violation of §16 First; and (d) terminals may not employ exclusive-patronage contracts.

6. The Commission held no formal hearings, evidentiary or of law.^{3/} Neither oral nor written evidence was received under oath, and of course no cross-examination occurred. No briefs were invited or received, and no oral argument was held.

The only material before the Commission of which petitioner had notice consisted of the following documents:

- (1) The two agreements, T-2271, T-2272 (Exhibits 1 and 2 hereof)
- (2) Petitioner's Protest dated March 11, 1969 (Exhibit 3)
- (3) Response of New York City and the Port of New York Authority dated March 18, 1969, with two attachments (Exhibit 4)
- (4) Telegram of Petitioner dated March 17, 1969 (Exhibit 5)
- (5) Supplementary Response of the Port of New York Authority dated March 21, 1969 with three attachments (Exhibit 6)
- (6) Reply of Petitioner dated March 27, 1969, to Supplementary Response of the Port of New York Authority (Exhibit 7)
- (7) Petitioner's Communication dated April 8, 1969 (Exhibit 8)

3. The reference on page 5 of the Commission's order to "three public hearings in New York" should not be understood to have been Commission hearings. They were apparently meetings of the City's Board of Estimate. Exhibit A.

7. On April 10, 1969, the Commission issued its order of approval.^{4/} The order states that "Proponents have demonstrated a transportation need for the agreements and it would appear that the agreements are not unjustly discriminatory or unfair or detrimental to the commerce of the United States and are not contrary to the public interest" (Exhibit A, pp. 3-4). Petitioner's protest was disposed of by the assertion that "The particular interests of the protestants appears [sic] to be indirect and remote" (p. 4); and that "In the past no passenger terminal facilities in New York have been provided by private interests." Id. See also page 5, where an account of certain hearings before the Board of Estimate of New York City is given, which includes a reference to protestant's participation, again in an apparently derogatory sense.

The substantive basis for the approval is a finding that terminal facilities in New York "are substandard, dilapidated, run-down, inefficient and unattractive. For years it has been recognized by governmental bodies, the steamship industry, and labor interests that ocean passenger service at New York has suffered from these inadequacies. Modern and efficient passenger

4. The order is actually dated April 7, 1969. By some special convention, the Commission dates its orders as of the date its members vote (apparently on the result rather than the official text). We have been assured that no other party received notice of the decision prior to official issuance on April 10, 1969. But compare 28 U.S.C.A. §2344 on the requirement for prompt service after entry.

facilities for New York are essential if ocean passenger vessels are to continue service at that Port" (pp. 4-5). The absence of any opposition but that of protestant is recited. "No passenger lines appeared in opposition."^{5/} The Commission is thus "persuaded that these factors demonstrate that the agreements encompass sufficient transportation benefits in the public interest to warrant their approval. In fact, the transportation need is so clear we consider it essential that the project be permitted to be initiated as soon as possible." (p. 6).

But the Commission then goes on to observe that the agreements "are unique, and involve relationships and obligations which in their present form have not heretofore been subject to Commission consideration ... under section 15 of the Shipping Act, 1916 [C]ertain clauses and provisions ... are of especially anti-competitive character and effect. Standing alone this does not require disapproval of the agreements or portions thereof." *Idem*. The solution is that the Commission reminds the parties of its continuing jurisdiction over them (p. 6), and that "Any aggrieved party, whether or not a party to the agreements, may avail himself of the ... procedures established by this Commission for the hearing of disputes, complaints or other

5. It appears clearly from the context that the Commission's summary of interests supporting and opposing the project relates to certain proceedings before the New York City authorities, and not to proceedings before the Commission itself. See note 3, *supra*, p. 7.

disagreements" (p. 7). Further, because of their "particularly anticompetitive provisions", the Commission says it will demand continuing information about the functioning of the agreements, and also the filing of tariffs on 30-days notice. Id.

8. On April 11, 1969, the Commission denied protestant's^{6/} application for a stay pending this Court's review, and on April 17, 1969, this Court denied a stay but ordered expedited review. The Petition for Review was dated April 14, 1969, and bears No. 22936.

6. In these papers, the petitioner is usually described as the protestant, in conformance with F.R.A.P. Rule 28(d), 28 U.S.C.A.

III. ARGUMENT

A single sentence in the Commission's final order of approval disposes of all the legal issues of which the agency takes notice in the case:^{7/} "Proponents have demonstrated a transportation need for the agreements and it would appear that the agreements are not unjustly discriminatory or unfair or detrimental to the commerce of the United States and are not contrary to the public interest." (Exhibit A, pp. 3-4)

The remainder of the order sets out, apparently as matter of common knowledge ("For years it has been recognized, etc." Exhibit A, p. 4), the essential need for a new passenger-ship terminal in New York, and disposes of the protestant as having only "indirect and remote" interest.^{8/} Id.

Broadly, the first question is whether the Commission had authority by summary proceedings, without hearing evidence or legal argument, without permitting confrontation of the adversary

7. Protestant contended that the agreements violated §15 in violating §16 First ("The Commission shall ... disapprove ... any agreement ... that it finds to be ... in violation of this Act"). The Commission takes no notice of this issue, or of protestant's further contention that noncarriers may not employ systems of exclusive patronage under §15.

8. These "findings" occupy two of the eight pages of the order; the other six pages consist half of preliminary summary (pp. 1-3), and half of a reminder that the Commission will maintain interest in the operation of the agreements on account of their "especially anti-competitive character and effect." (pp. 6-8)

interests, and with only the representations before it which are enumerated in Par. 6, p. 7, supra, to approve agreements that in its own words are "unique, and involve relationships and obligations which in their present form have not heretofore been subject to Commission consideration by virtue of its authority under Section 15 of the Shipping Act, 1916."

The second broad question is whether, assuming the Commission has such authority, it has made the requisite findings of fact and law, upon an intelligibly reasoned basis, to permit approval under §15.

- A. The Commission erred in denying full evidentiary hearing and in approving the "particularly anti-competitive provisions of the agreements" without affording opportunity for hearing and legal argument, and without making findings of fact and conclusions of law under §15.

The Commission's proceedings in this case violated accepted canons of fair hearing and prevented the compilation of a record adequate for its own essential duties under §15.

The courts have not been dogmatic on what such a record shall contain or how it shall be gathered. The nature of the issue and the scope and intensity of the controversy have much influence. If the question is exclusively of law, an evidentiary hearing may be dispensed with, *American Export Isbrandtsen Line v. FMC*, 334 F.2d 185 (C.A. 9, 1964); *Persian Gulf Outward Freight Conf. v. FMC*, 375 F.2d 335 (C.A.D.C. 1967); *Los Angeles v. FMC*, 388 F.2d 582 (C.A.D.C. 1967). But it is obvious that in that

case the parties ought to be allowed briefs and possibly argument, and this Court has only recently advised the Commission that even if only a point of law is involved it should allow affidavits of fact so as to present a better background for review, *Persian Gulf*, supra, 375 F.2d at 341 note 4. Such affidavits may also be appropriate in cases where the facts are either uncontroverted or easy of ascertainment, and accordingly confrontation is less significant in testing them. That the judgment in such cases may be doubtful (responding, perhaps, to considerations of supposed time urgency) is shown by *North Atlantic Westbound Frgt. Ass'n. v. FMC*, 397 F.2d 683 (C.A.D.C. 1968); *id.*, reported in 8 S.R.R. 20,245 (C.A.D.C. 1968), where having first adopted the procedure of affidavits and briefs the Commission, this time perhaps balancing this Court's expression of doubt in the stay proceeding against its own conviction of urgency, requested a remand for reconsideration.

But the Court has been quite clear where genuine factual issues exist. "Petitioner raises a procedural contention that the Commission could not extend any approval because no evidentiary hearing was held. The Commission asserts as an answer that the statute only requires a hearing before disapproval, cancellation or modification of an agreement. We are not disposed to accept the view that even where there is a sharp evidentiary question on a material fact the Commission could dispense with a hearing and confer approval." *Los Angeles v. FMC*,

388 F.2d 582, 583 (C.A.D.C. 1967). The argument advanced by the Commission in that case was curiously regressive in light of its responsibilities under §15 as it has itself staked them out with the authority of the Supreme Court.

We must notice in this context the elementary requirement that the Commission's findings, profoundly important in the vivified scheme of shipping regulation, must be framed in reasoned and intelligible terms. "The Commission's discussion ... is as sparing in detail as it is flat in conclusion." *U.S. Atlantic & Gulf Conference v. FMC*, 364 F.2d 696, 699 (C.A.D.C. 1966). "[T]here is no exception to the requirement of §8(b) of the Administrative Procedure Act for findings sufficient to support the Commission's orders. Those findings are completely lacking in this record." *Anglo-Canadian Shipping Co. v. FMC*, 310 F.2d 606, 615 (C.A. 9, 1962). "Our difficulty ... is that the Commission made no findings on the point. It merely stated the abstract proposition...." *Guam v. FMC*, 329 F.2d 251, 255 (C.A.D.C. 1964). See also *Puerto Rico v. FMB*, 288 F.2d 419, 420 (C.A.D.C. 1961); *American President Lines v. FMB*, 317 F.2d 887, 890 (C.A.D.C. 1962). In all these cases, which are by no means exhaustive, the agency has been admonished to examine the issues, to weigh the evidence, and to explain the reasoning that guides it to its conclusions of fact and law. These requirements have special pertinence, considering their far-reaching economic consequences, to the Commission's rulings under §15.

We submit that the order under review palpably fails, measured against these tests. Here are agreements that on their face foreclose passenger-ship terminal competition for 73 years;^{9/} that decree one carrier may receive service at the only permitted terminal and that another may not, depending only on which one agrees to yield up exclusive patronage; that contain monopoly clauses which the Commission has stricken down three times in the last year; that raise almost every conceivable statutory question of public interest, detriment to commerce, discrimination between carriers, and prejudice between terminals. Here are agreements so "unique" in the Commission's experience, so visibly repressive of competition, that the Commission, obviously uneasy, felt "required" to "emphasize its jurisdiction" after approval. Here is a potential competitor, directly denied the right of entry, and demanding a hearing on the challenges the agency itself should have raised vigorously.

Yet the Commission disposes of all these issues in a single sentence, without investigation, without a record, without discussion, without reasoning, in a somewhat weakly worded and incomplete paraphrase of §15, and without any explanation of why

9. This although the City's investment is to be recouped with interest and possibly with a handsome profit in less than one-third of that time. According to agreement T-2271 par. 4B (Exhibit 1, p. 7A) the first \$750,000 of profits from the operation are payable to the City as additional rent. This represents 16-2/3 percent of the average annual rental, which is itself the average annual principal and interest.

"Standing alone this does not require disapproval of the agreements or portions thereof." (Exhibit A, p. 6)

This has not been the Commission's usual practice. "Section 15's authorization of agreements ... does not dictate approval simply because such an agreement is filed and approval is desired by the parties to the agreement." Passenger S.S. Conferences - Travel Agents, 7 S.R.R. 457, 465 (FMC 1966). "In discharging our duties under Section 15, we are not limited to those matters parties to agreements wish us to see. We are required to go further. Where agreements are strongly protested, as here, we must examine not only the terms of an agreement, but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objectives and results of the agreements.... To decide otherwise is merely to reward the clever draftsman at the expense of our regulatory responsibility." Terminal Lease Agreements, 5 S.R.R. 1057, 1064 (FMC 1965).

1. The order under review notices that "This project has been the subject of three public hearings in New York." (Exhibit A, p. 5) But such hearings, held presumably by legislative bodies of the City of New York, cannot substitute for hearings by the Commission under §15. One can scarcely believe that the Commission accepts the investigation made by one of the parties at interest before it as displacing its own statutory proceedings, and as dispositive of issues upon which the law requires its own members to pass. The City of New York has no authority to grant

exemptions under §15; it is in fact an applicant for such exemption. The Commission could neither delegate nor evade its own duty to test that application against the statute over whose administration it presides.

2. The Commission does not ordinarily pass over the deficiencies of agreements, under the plenary §15 duty, because of doubts concerning harm to a protestant or concerning its intention or ability to enter the field if not excluded by them. In at least three recent cases the Commission has disapproved agreements where the injury to any particular individual was considerably less concrete than here.

In Transshipment and Apportionment Agreements, 7 S.R.R. 799, 809-811 (FMC 1966), where connecting carriers contracted to use only each other's services for transshipment, and where, since the first carrier monopolized its trade, its promise to patronize the conference of on-carriers exclusively meant that "the possibility of any independent Second Carrier's entering the trade is utterly precluded", the Commission struck down the agreement; "... its only purpose is to foreclose completely the possibility of any independent competitor's ever entering this trade. To approve such a provision would be clearly contrary to the public interest. At best, the provision is meaningless; at worst it would constitute our sanction of an absolute monopoly in an important segment of a trade in the foreign commerce of the United States."

And close to our present case: "... Weyerhaeuser retained the right to operate its public terminal (Atlantic) ... No other tenant at Port Newark was given a similar right.... While it is not at all clear that Ballmill or other tenants would have the necessary resources or even the desire to operate a public terminal, the denial of such a right by the terms of their lease coupled with the grant of such a right to Weyerhaeuser results in undue preference and prejudice and is an unreasonable practice within the meaning of the Act." Ballmill Lumber and Sales Corp. v. Port of New York Authority, 10 S.R.R. 131, 139 (FMC 1968).

[Emphasis supplied]

Finally, the Commission admitted as a party, and carefully considered the protest to a pending merger of, a shipping company that, like petitioner, was only planning a competitive service. See AML, APL and PFEL Merger Agreement, 9 S.R.R. 191, 223, 229 (I.D. 1967).^{10/}

Yet in this case the Commission has declined to investigate an agreement at least partly because it deemed "remote" the interest of a party which, upon approval of the agreements, is immediately excluded from entering the terminal field in New York City. Protestant was not an unknown hypothetical competitor which might some day find barred its entry into the Indonesian trade;

10. The same intention to enter the trade satisfied the requirement for standing for this party when it sought review. Matson Navigation Co. v. FMC, 405 F.2d 796 (C.A. 9, 1968).

it was not a person about whose "necessary resources or even the desire to operate a public terminal" at Newark the Commission had any reason to be in doubt. It was surely at least as imminently able and desirous to enter as the protestant objecting to the APL merger. To deny a hearing in such a case ran contrary to the Commission's established practice as well as the requirements of law.

3. The cases cited above, and others, really illustrate the principle that since agreements within the scope of §15 are illegal until approved, *Isbrandtsen Co. v. United States*, 211 F.2d 51 (C.A.D.C. 1954), the Commission's study must precede approval rather than await destructive impact after approval. As Mr. Justice Harlan said in *Volkswagenwerk A.G. v. FMC*, 390 U.S. 261, 285 (1968): "Hence if the question were simply whether substantive challenge to a maritime agreement (dealing with labor or any other matter) is to take place in advance of implementation of the agreement or, instead, during its operation, I should have thought it clear that Congress chose the former alternative."

And the Commission itself has said: "However, we do not hold with the view that we must await actual, or an expression of intended, domination on the part of the foreign-flag segment before we can act. We will not await an actual attempt by the foreign-flag segment of the conference to block a rate desired by the American-flag carriers." *Conference Rates on Household Goods*, 9 S.R.R. 775, 793 (FMC 1967).

As will be seen below, the Commission has in fact formulated a whole theory obliging proponents of an agreement to go forward with proof of justification when any of its provisions on their face violate certain standards. Thus, they must prove that overriding transportation need for the agreement outweighs the public interest in free competition, *FMC v. Svenska Amerika Linien*, 390 U.S. 238 (1968); that transportation considerations of value or cost justify discriminations in price of service, *Conference Rates on Household Goods*, *supra*, at 792; so too with respect to discriminations in terminal service, *Ballmill Lumber & Sales Corp. v. Port of New York Authority*, 10 S.R.R. 131 (FMC 1968); and that rates shown to be *prima facie* unreasonable and detrimental to commerce are in fact reasonable, *Rate Structures in Inbound and Outbound Trades*, 10 S.R.R. 417 (FMC 1968).

In this case, the Commission has failed to put the proponents to their proof on just those issues and their analogues, has not prior to approval performed its investigation of what it admits to be unique and particularly anticompetitive provisions, and has in truth postponed until some indefinite date after approval the legal test that the law requires be made in advance.

4. We submit as well that the Commission's assertion of a public interest in early construction of the proposed terminal could not alone justify summary approval without the required hearing. The substantive error in its reasoning on this score is discussed below.

Of course, the mere desirability of prompt construction cannot excuse the duty of prior approval and the duty of proper investigation before that. But here we note that, in precisely similar circumstances, the Commission has found an expedient to protect the public interest at once in the terminal and in free competition, a tested tool, approved by this Court, for protecting both those concerns without bringing them into conflict. It could, as suggested by the protestant (Exhibit 8), have approved the agreements except as to the "unique ... anticompetitive provisions", which latter it could have set for hearing. *Los Angeles v. FMC*, 388 F.2d 582, 583 note 4 (C.A.D.C. 1967): "In approving the Matson-Oakland agreements subject to a subsequent hearing [on controverted points], the Commission acted reasonably in considering 'the impending improvements and construction involved, and the financial arrangements that must be taken to proceed with the project.'"

The Commission did not elect to follow this tested path, although there were no facts before it showing that what was practicable in Oakland was not in New York. Instead, it laid aside sub silentio the emphatic declarations of high policy that have earned it a measure of judicial respect, cf. *FMC v. Svenska Amerika Linien*, 390 U.S. 238 (1968); *Passenger S.S. Conferences - Travel Agents*, 7 S.R.R. 457 (FMC 1966), and ignoring the injury not alone to the important public interests confided to it but inflicted directly upon a party seeking entry into competition, foreclosed petitioner's rights under the Administrative Procedure Act, 5 U.S.C.A. §554.

5. It was also a breach of the Administrative Procedure Act to fail to pass on statutory issues squarely raised by protestant. Whether (1) the exclusive privilege to the Port Authority offended the preference-prejudice clause of §16 First both as respects carriers and terminal operators, and whether (2) the Authority, as a noncarrier, may lawfully employ an exclusive patronage contract at all, were material issues under the statute, which the Commission did not rule upon in violation of §8(b), APA, 5 U.S.C.A. §557(c).

To the extent that this constituted an implied ruling against the contentions, the Commission ignored principles it has itself proclaimed within the year. As will be shown below, it has held that public terminals must give equal service to all, not merely to regular customers, and may not turn away any applicant for service; it has held that terminals may not exact exclusive patronage from carriers as a condition to service; it has held that this very Port of New York Authority may not allow exclusively to one tenant the privilege of operating a public terminal and deny that privilege to others.

Thus, the failure to rule was a material breach.

6. Finally, we must examine the Commission's contention that subsequent surveillance, including the right of aggrieved parties to complain, will cure all the procedural evils of its present course. We have already argued that this skirts dangerously close to the method of its predecessor in *Isbrandtsen*, 211 F.2d 51

(C.A.D.C. 1954), and that if it means what it says it really amounts to deferring its statutory duty of prior approval. But is it even a real alternative for the protestant here?

Would not the protestant be met at the threshold (at least during any contemporary time frame worth while to it), if it complained under §22, Shipping Act, 1916, 46 U.S.C.A. §821, with a defense in the nature of *res adjudicata* and estoppel of collateral attack? If the Commission's proceedings here are valid, if it has validly decided protestant's contentions and measured its damage, it is hard to see (notwithstanding the general rule that administrative agencies are not bound by the doctrine, or even by *stare decisis*) why the protestant should expect to be heard *de novo*. Compare *Matson Navigation Co. v. FMC*, 405 F.2d 796, 798 (C.A. 9, 1968).

What underscores the error of failing to accord the full prior hearing on an adjudicatory issue which the statute decrees, 5 U.S.C.A. §§554, 556, 557, is a consideration that should have commended itself to the intervenors as well as the Commission. Urgency has been the excuse for summary action. Will it be better for the project to subject it to attack while it is building or before it starts? It is greatly to be feared that the sense of urgency which has motivated disregard of the protestant's rights at the start will give short shrift to what may then be deemed to threaten waste of the investment by then fully committed. Here again is seen the wisdom of the statutory scheme in demanding investigation prior to approval.

CONCLUSION TO POINT A

To this order, if to any, would seem applicable the judicial strictures quoted above (p. 14). "The Commission's discussion is as sparing in detail as it is flat in conclusion"; "Our difficulty is that the Commission made no finding on the point. It merely stated the abstract proposition"; "There is no exception to the requirement ... for findings sufficient to support the Commission's orders. Those findings are completely lacking in this record." Supra. "For the Commission, without any attempt whatever to comply with the requirements of §8(b) [of the Administrative Procedure Act] to issue its conclusory order ... merely in the language of the statute, was an egregious error." *Anglo-Canadian Shipping Co. v. FMC*, 310 F.2d 606, 617. (C.A. 9, 1962). Coupled with all this is the denial to protestant of any form of hearing in a matter involving direct injury to its interests.

B. The Commission erred substantively in approving the agreements

From the Commission's procedural errors in the present case necessarily followed its substantive errors. Moreover, its total failure to analyze the legal content of the issues the agreements raised, even when warned by the protestant, conditioned its indifference to a proper record. These reciprocal errors interacted to produce the ultimate error of approval.

All points at issue were disposed of in the single sentence: "Proponents have demonstrated a transportation need for the agreements, and it would appear that the agreements are not unjustly discriminatory or unfair or detrimental to the commerce of the United States and are not contrary to the public interest." (Exhibit A, p. 3) As stated above, the Commission did not pass on two other statutory issues at all.

These findings and omissions to find were alike erroneous.

1. The issue of unjust discrimination and unfairness

Section 15 requires disapproval of agreements found to be unjustly discriminatory or unfair between carriers, among other interests. Agreement T-2272, par. 9 (Exhibit 2, p. 5) provides that all carriers subscribing must give their exclusive

patronage to the Port Authority terminal for 73 years, and that no carrier may receive service at such terminal unless it so subscribes.

This issue, raised by protestant because the provision simply preempts the whole potential market, was disposed of in the same single sentence, with no findings of fact and no reasoning to explain why it is not unjustly discriminatory and unfair to refuse to one carrier the terminal service accorded to another, when the only distinction between them is that the former declines to yield up its exclusive patronage.

Apart from whether a public terminal can lawfully decline service at all, a question so fundamental that it is scarcely conceivable how the Commission overlooked it, freshly enunciated as it has been within a matter of weeks, *Salvesen & Co. v. West Michigan Dock*, 10 S.R.R. 745, 751 (FMC Dec. 12, 1968), this is the classic case of unjust discrimination based on persons rather than the conditions of service as reflected in cost and value.

Protestant is unaware of any maritime system of exclusive patronage by carriers that is enforced by outright refusal of service. Refusal of space to a shipper "because such shipper has patronized any other carrier" would violate §14 Third, Shipping Act, 1916, 46 U.S.C.A. §812 Third; and even

penalty rates, the common form, required enactment of special legislation in 1961 to acquire legality, §14b, Shipping Act, 1916, 46 U.S.C.A. §813a; see *FMB v. Isbrandtsen*, 356 U.S. 481 (1958). Yet here the agreements expressly call for the denial of service. Though terminals are not carriers, the policy of the act clearly flags this feature as presumptively unlawful, especially in the absence of §14b's careful safeguards.

The Commission's recognition of this aspect as "unique" required it to investigate and in the absence of clear justification to disapprove it.

In the simplest case of alleged discrimination in rates between shippers, the Commission follows a recognized pattern: "A difference of rates for substantially identical services is prima facie discriminatory.... Hearing counsel having established this prima facie case, it was then up to respondents to go forward and show that the discrimination was justified by some bona fide transportation condition." *Conference Rates on Household Goods*, 9 S.R.R. 775, 792 note 29 (FMC 1967). How much more obviously this rule applies in a "unique" denial of service by a public utility to which the Commission has applied the same tests as to carriers.

The only part of the order that the Commission may have thought bore distantly upon the issue was its reference to the

failure of any carrier to protest. At this date, that fact can scarcely be deemed significant: "The fact that no independent competitors of NYJRA members appeared to protest ... is not controlling." Transshipment and Apportionment Agreements, 7 S.R.R. 799, 811 (FMC 1966). For that matter, some negative inference might have been drawn from the slow pace of carrier adherence to the agreements under review. See Exhibit A, p. 2 note 1; and Exhibit 6, letter of Italian Line.

But if the Commission's remark implied a doubt of protestant's standing to challenge the provision, it seems sufficient to observe that if effectuated, par. 9 would simply preempt the whole potential market in which protestant must share.

2. The issue of the public interest

During the last five or six years the Commission has erected a structure for dealing with the public-interest clause of §15 which, after preliminary doubts on the part of this Court, *Svenska Amerika Linien v. FMC*, 122 U.S.App.D.C. 59, 351 F.2d 756 (C.A.D.C. 1965); *id.*, 372 F.2d 932 (1967), now enjoys massive judicial support. The formulation derives from incorporating the national policy favoring business competition, as proclaimed in the antitrust laws, into the

term "public interest". If the agreement presenting for exemption under §15 would violate the antitrust laws, it must be disapproved unless other evidence is brought forward showing, in effect, that it serves a specific transportation need outweighing the interest protected by the antitrust laws. *FMC v. Svenska Amerika Linien*, 390 U.S. 238 (1968); *Volkswagenwerk A.G. v. FMC*, 390 U.S. 261 (1968); see *Matson Navigation Co. v. FMC*, 405 F.2d 796 (C.A. 9, 1968); *Sabre Shipping Corp. v. American President Lines*, 285 F.Supp. 949, 956 (S.D.N.Y. 1968).^{11/}

The immediate implication of this rule is that if the proponents fail to come forward with the offsetting evidence required, the agreement must fall: "Although no evidence in the record actually tends to refute respondents' theory, it is also clear that respondents failed to come forward with any evidence to support their claim. The theory was therefore insufficient

11. It is settled that municipal terminals are subject to regulation by the Commission under the Shipping Act. *California v. United States*, 320 U.S. 577 (1944); *Los Angeles v. FMC*, 385 F.2d 678 (C.A.D.C. 1967). Their preferential agreements with carriers are regularly processed under §15. Terminal Lease Agreements at Long Beach, 9 S.R.R. 391 (FMC 1967); T-1768 Terminal Lease Agreement, 6 S.R.R. 899 (FMC 1966); T-4 Long Beach, T-5 Oakland, 5 S.R.R. 1057 (FMC 1965). The agreements here explicitly conditioned their own effectiveness on approval by the Commission (T-2271 par. 36, Exhibit 1, p. 26; T-2272 par. 8, Exhibit 2, p. 5).

to justify the undeniable injury to interests ordinarily protected by the antitrust laws." Svenska, 390 U.S. at 251. Although still perhaps phrased in terms of going forward with the evidence, the practical effect, by no means unusual, is to throw the burden of justification upon those who seek the exemption. Ibid. at 246.

But there is another implication. The Commission itself is inhibited from approving agreements that violate the antitrust laws without finding the offsetting considerations from facts of record. The affirmative duty rests upon it in a new sense to "scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." *Isbrandtsen v. United States*, 211 F.2d 51, 57 (C.A.D.C., 1954), quoted with approval in *Volkswagenwerk A.G. v. FMC*, 390 U.S. 261, 274 note 21. One Court of Appeals has already called attention to this duty in minatory terms, by implication rebuking the Commission for falling below "this high standard". *Matson Navigation Co. v. FMC*, 405 F.2d 796, 802 and note 12 (C.A. 9, 1968).

In short, former readings of §15, under which a neutral record was deemed to preclude disapproval of the agreements,

cf. Svenska Amerika Linien v. FMC, 351 F.2d 756, 761 (C.A.D.C. 1965), have given way to the current rule that a neutral record precludes approval, and that positive transportation needs for anti-competitive arrangements must be proved by proponents and found expressly by the Commission before approval can be accorded.

The Commission has applied this principle to the very situation presented by the instant case. Only six months before its present order, it struck down two contracts between western ports and carriers closely analogous to the agreements here (though milder in reach). Agreements No. T-2108, T-2108-A, 10 S.R.R. 556 (FMC Oct. 16, 1968); Agreement No. T-2138, 10 S.R.R. 571 (FMC Oct. 16, 1968). In those cases, the agreements contained the promise of the port to construct special terminals for containerships, and to lease them to certain Japanese lines. Reciprocally, the lines promised to route through the port all their containership cargo business. Citing Svenska, the Commission declared that it "must consider the antitrust implications of any agreement which limits free competition and has adopted the principle that restraints which contravene the antitrust policy of the United States will be approved only if facts appear which demonstrate that the restraints imposed are required by a serious transportation need,

are necessary to secure important public benefits, or are in furtherance of a valid regulatory purpose of the Act." 10 S.R.R. at 562. "The routing clause restricts free competition and presumptively runs counter to the public interest ... Free competition is the rule and a restraint on competition may not be approved unless sufficient justification therefor appears on the record. The Commission recognized that the burden of sustaining such practices is a heavy one...." At 563. The Commission then proceeded to test the claimed justification, which in the Los Angeles case was that the port needed the clause "as a means of protecting its investment in the facility and assuring a fair return on the land and improvements assigned to the Lines for preferential use." Id. Upon analysis it concluded that the clause was unnecessary for that purpose, because the lines had direct economic interest in utilizing the new terminals to the full in order to reap the advantage of a maximum rent provision. "Applying the test of necessity to the routing clause, it cannot be found that it is required to protect the port's investment and the record falls short of demonstrating justification for exemption from antitrust policies." Id. And finally: "A clause requiring a lessee or a preferential user of terminal facilities to utilize such facilities so as to substantially exclude

other terminals from securing its patronage restricts free competition in violation of antitrust policies, and must be justified in order for the Commission to approve it under Section 15 of the Shipping Act, 1916. The record not demonstrating that such a 'routing clause' in Agreement No. T-2108 is required by a serious transportation need, is necessary to secure important public benefit, or is in furtherance of a valid regulatory purpose, it is disapproved." 10 S.R.R. at 570.

The case of Agreement No. T-2138, supra, is stronger, because Oakland's justification was that it needed the clause to match that of Los Angeles! The Commission struck it down: "Justification for exemption from the antitrust policies of the United States and for approval of the routing clause does not appear on this record." 10 S.R.R. at 578.

It is remarkable that the Commission has not applied either the principle or the analytical method of these recent decisions to the identical case before it, in which the very same justification is claimed.

As it happens, the issue of the public interest is the only one in the present case with which the Commission has purported to deal at all. Exhibit A, pp. 4-5. From unspecified sources the Commission draws the information that "Modern

and efficient passenger facilities for New York are essential if ocean passenger vessels are to continue service at that port." (P. 5) And this perhaps self-evident proposition "persuades" the Commission "that the agreements encompass sufficient transportation benefits in the public interest to warrant their approval. In fact, the transportation need is so clear we consider it essential that the project be permitted to be initiated as soon as possible." (P. 6)

Here the Commission commits a grievous lapse of logic and law. It equates transportation need for a terminal to transportation need for the "unique" clauses that it characterizes itself as "particularly anticompetitive". It made no such error in the two terminal cases just cited, where it carefully tested the economic need for exclusive patronage to make the terminal a success (and concluded it was unnecessary).

For how does it follow from the fact that a new terminal is essential that the terminal operator necessarily requires absolute monopoly for 73 years? Was it not demanded before that equation was accepted that the Commission find explicitly: (a) the terminal cannot be created and operated unless granted such monopoly for 73 years, and (b) the terminal is so

essential to shipping that its creation and successful operation outweigh the public interest in free competition?

Of course, the Commission makes no such findings. Nor could it have done so without a full investigation of the economic facts.

With respect, we submit that the need for such an investigation should have been suggested not merely by the requirements of law but by these agreements read on their face: (1) the term of the primary lease is 20 years (T-2271 par. 3(a), Exhibit 1, p. 4); (2) the basic rental is calculated to repay the City "the entire construction cost" and "debt service costs for the entire period" (Ibid. par. 4A, Exhibit 1, p. 7A; see Schedule of Payments attached thereto); thus the whole investment will be paid off in 20 years. Assuming that monopoly is necessary at all to protect this investment, why for 50 years beyond that --- and for 3 years before the term even begins?

Again, we read in a brochure attached to Exhibit 4 that the Port Authority requires revenue of \$9 million per annum to cover costs of operating the terminal, including rent (Exhibit 4, Brochure B, pp. 38-39). For the first year of operation, revenue from carriers and passengers (the latter in the form of a head charge), is to be \$8-3/4 million on an

assumed 700,000 passengers (T-2272 par. 7, Exhibit 2, p. 4), which is the number projected for future years in the brochure mentioned above. But maximum revenue from the carriers may rise as high as the actual number of passengers multiplied by \$20.00 (Exhibit 2, p. 4); if the projection is accurate, a maximum revenue of \$14 million is possible. But at that rate, less than 65 percent of the total passengers would be needed to make the operation a success. Why then is a total preemption necessary of all possible ships and all possible passengers?

We submit that the Commission made no finding, and had no evidence from which it could have made any finding, sufficient "to justify the undeniable injury to interests ordinarily protected by the antitrust laws", Svenska, 390 U.S. 238, 251 (1968) -- injury that the Commission has itself acknowledged.

3. The issue of detriment to commerce

The Commission has made no findings of fact relating to the effect upon commerce of excluding all competitive passenger terminal facilities from New York for three-quarters of a century. It says merely in the single sentence quoted above that "it would appear that the agreements are not ... detrimental to the commerce of the United States...." (Exhibit A,

p. 3). Surely here was an issue as to which, once fairly raised by protestant, more than this perfunctory disposition was demanded. The ocean passenger business is notoriously declining; one of the prominent signatories has laid up its three famous liners; another threatens the same action imminently; the greatest ship of all is reported in financial difficulties. What will be the effect, on top of these troubles, of compelling all to patronize a monopoly terminal, and depriving them of savings they might find in competitive facilities such as protestant states it plans?

4. The issue of prejudice and preference

§16 First of the Act, 46 U.S.C.A. §816, forbids terminals (among others) to give undue or unreasonable preference or advantage to any particular person, or to subject any person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Commission did not dignify this issue by noticing it. Yet the agreements raised it in two ways, as affecting protestant and the carriers. Taking the latter first, it is again remarkable that the Commission failed to bring to bear principles it had reaffirmed as recently as December 1968: "It is unreasonable for a terminal operator, charged with the

duty to treat all persons alike within the bounds of reasonableness, to grant preferential treatment to one common carrier over another on the basis that the preferred carrier is a regular customer.... Here the preference to the Russ and prejudice to the Saldura was undue and unjust and, therefore in violation of Section 16 First." *Salvesen & Co. v. West Michigan Dock*, 10 S.R.R. 745, 756 (FMC 1968). If to accord preference in service to a regular customer violates §16 First, outright refusal of service to nonsignatories (T-2272 par. 9, Exhibit 2, p. 5) would seem a more extreme violation; and such a violation offends §15 as well if it flows from an agreement falling within its terms.

Similarly, an agreement which grants to one party exclusive right to operate a terminal and denies all such right to existing or potential competitors confers undue and unreasonable advantage and preference upon the former and inflicts undue and unreasonable disadvantage and prejudice on the latter in violation of both sections. And here again it is marvelous that the Commission should have forgotten its fresh pronouncement of the principle less than a year old in a case involving the same Port of New York Authority: "In addition to the right to perform its own backhandling, Weyerhaeuser

retained the right to operate its public terminal (Atlantic). No other tenant at Port Newark was given a similar right. Through its Atlantic operation, Weyerhaeuser was able to gain a substantial advantage over the other tenants, both in terms of profits and in terms of large scale lumber operations. While it is not at all clear that Ballmill or other tenants would have the necessary resources or even the desire to operate a public terminal, the denial of such a right by the terms of their lease coupled with the grant of such a right to Weyerhaeuser results in undue preference and prejudice and is an unreasonable practice within the meaning of the Act."

10 S.R.R. 131, 139 (1968).

The Commission's omission to mention this issue even in the perfunctory fashion with which it disposed of all other questions in the case was, therefore, not only a procedural error under §8(b), Administrative Procedure Act, 5 U.S.C.A. §557, but (accepting the omission as a holding by implication) as well substantively erroneous.

5. The issue of whether a noncarrier may exact
exclusive patronage

The Commission likewise ignored entirely protestant's contention that since the decision in *FMB v. Isbrandtsen*, 356 U.S. 481 (1958), the only provision of the Shipping Act

authorizing exclusive patronage contracts -- and by common carrier only -- is §14b, 46 U.S.C.A. §813a. That decision concluded that such contracts ran afoul of §15 in the respect that as to carriers they violated §14 Third, 46 U.S.C.A. §813. The Commission has itself determined that discrimination by a public terminal in favor of regular customers violates §16 First, *Salvesen & Co. v. West Michigan Dock*, 10 S.R.R. 745, 756 (FMC 1968); and exclusive patronage as a condition of service is plainly a fortiori. See point 4, supra, p. 37, showing that a violation of §16 First flowing from an agreement subject to §15 likewise violates the latter section, and stands in exact parallel to the holding of *Isbrandtsen*. It follows that since §14b applies only to carriers, other persons subject to the Act, including terminal operators, may not under §15 employ such a contract as par. 9 of agreement T-2272 (Exhibit 2, p. 5).

SUMMARY OF POINT B

On all these issues of public policy, detriment to commerce, unjust discrimination, and undue and unreasonable preference and prejudice, the exclusive provisions of the subject agreements on their face raised a presumption against their validity under §15, under controlling decisions of the

courts and the Commission. The Commission was bound to investigate them, and to require their proponents to come forward with justifying proof; it entirely failed to make the findings required for valid approval. It also omitted to pass at all upon critical issues presented. It, therefore, committed error which this Court must, we submit, reverse.

WHEREFORE, petitioner prays the Court to reverse the order of the Federal Maritime Commission under review; or in the alternative to remand the case to the Commission for the hearing required by law; and for such other and further relief as the Court may deem appropriate.

Respectfully submitted,

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April 25, 1969

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,936

MARINE SPACE ENCLOSURES, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION TO REVIEW AN ORDER
OF THE FEDERAL MARITIME COMMISSION

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U.S. Department of Justice

Washington, D.C.
May 13, 1969

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 13 1969

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Commission

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STATEMENT OF THE ISSUES

The City of New York and the New York Port Authority submitted to the Commission for approval pursuant to section 15 two agreements providing for a consolidated passenger terminal facility. Marine Space Enclosures, a company whose alternative plan for a terminal was rejected by the City of New York, protested the agreements. and requested that the Commission hold evidentiary hearings. The Commission, finding that petitioner's interest was "remote and indirect" and that proponents had demonstrated a serious and urgent transportation need, approved the agreements over petitioner's protest.

In the opinion of respondents, the issues presented for review are:

1. Whether petitioner, whose proposal to build a terminal was rejected by the City of New York which owns all feasible passenger terminal sites and whose entry into the business is at best speculative, has the requisite standing to attack the Commission order.
2. Whether the Commission properly approved the agreements in question without holding evidentiary hearings where petitioner raises no substantial issues of material fact and where proponents had demonstrated a serious transportation need for the agreements.

This case has not been before this Court under the same or similar title, however, petitioners' application for a stay of the administrative order pending review was heard and denied by a panel of this Court on April 18, 1969.

COUNTERSTATEMENT OF THE CASE

Petitioner, Marine Space Enclosures, Inc., seeks review of an order of the Federal Maritime Commission approving certain agreements relating to the operation of a consolidated passenger terminal facility for ocean liners in New York City. The agreements were approved by the Commission pursuant to section 15, Shipping Act, 1916, on April 7, 1969. Jurisdiction to review orders of the Federal Maritime Commission rests on 28 U.S.C. 2342(3).

The facility in question had its inception as early as January 1966, when the City of New York commissioned the New York Port Authority to study the feasibility of replacing the dilapidated passenger terminal facilities in New York Harbor.

For 15 months, the Port Authority conducted an intensive study which included numerous discussions with the passenger carriers and public agencies charged with the development of the Port. In April of 1967 they issued an exhaustive report of the study along with their proposal.^{1/} The report contained information as to the urgent need for the new facility along with its economic feasibility. The proposal contained projected costs of the project together with the required technical specifications. Several hearings were held before the Board of Estimate, the City Planning Commission, and the City Council of New York.

^{1/} In September 1968 the Port Authority issued a supplementary report which reviewed their earlier finding and amended the proposal to conform to current developments.

On November 21, 1968, the Board of Estimate authorized two agreements which would implement the Port Authority proposal.

The first of these agreements (T-2271) embodies the lease of the property on which the new facility is to be built.^{2/} Under the agreement the Port Authority will be the sole operator of the facility. Also included is a provision that the new terminal will be built with funds received from a bond issue sponsored by the City of New York and guaranteed by the Port Authority.

In order to provide for the threshold success of the project, a second agreement (T-2272) between the City, the Port Authority and carriers using the facility provides for exclusive use of the new facility. This agreement provides that the carriers will use exclusively the interim and permanent facilities to be provided by the Port Authority for the period necessary to repay the capital expenditure of the permanent facility and 50 years thereafter.

In December 1968, after the project had become definite and plans for demolition were being made, the City held hearings on amending the City's budget to allow for construction costs of the new terminal. At those hearings petitioner submitted an artists rendering of a passenger terminal facility, which was to be part of a complex containing a hotel, dwelling units office units, restaurants and a revolutionary underwater parking

^{2/} All existing pier sites on Manhattan Island are owned by the City of New York. They are currently leased to the individual steamship companies. Since several of these piers will be demolished to make way for the new terminal, the agreement provides for consolidated interim facilities using other existing piers, to be operated by the Port Authority.

garage. This complex was to be built on the same site as that proposed by the Port Authority. In December of 1968, the City Council adopted the budget amendment, and hence rejected petitioner's proposal.

The Port Authority and the City then filed the two agreements with the Federal Maritime Commission for approval under section 15. Notice of the agreements was published in the Federal Register. Petitioner filed a protest and requested that the Commission hold evidentiary hearings. In his protest, petitioner appraised the Commission of the anticompetitive features of the agreement and noted that:

Under the terms of these agreements the City must and will deny to the protestants land, piers, wharves, work permits and licenses necessary to acquire, construct, reconstruct, operate or maintain passenger-vessel terminal facilities, which are an integral part of the development plans of protestants; and all passenger-ship operators, whether or not at present signatories of these agreements, will be penalized if they patronize any such facilities of protestants located anywhere within the jurisdiction of the City or the Authority. The protestants are therefore effectually precluded from proceeding with their plans so far as they include and depend on a passenger-ship terminal.

The American Dock Company, an affiliated company of petitioner and owner of certain piers on Staten Island, sought leave to intervene in the Commission's proceeding, but filed nothing other than a one-page petition noting that it desired to associate itself with the position of the petitioner. No steamship company sought to protest or otherwise participate before the Commission. After receiving replies to the protest from the proponent, counter-reply from the protestant and comments from other

interested parties, the Commission, on April 7, 1969, approved the agreements. It found that "proponents had demonstrated a transportation need for the agreements and it would appear that the agreements are not unjustly discriminatory or unfair or detrimental to the commerce of the United States and are not contrary to the public interest."

In its order of approval the Commission noted the urgent need for passenger terminal facilities and the fact that all practical sites for the terminal were owned by the City of New York which, in the past, had provided all passenger terminal facilities through leases to the individual carriers. The Commission also noted that public hearings were held before several City agencies which had approved the project. In finding the petitioner's interest "indirect and remote," the Commission noted that the City of New York had rejected its proposal. The Commission also referred to the fact that the property on Staten Island owned by petitioner's affiliated company was planned for a cargo facility. In conclusion the Commission advised the parties of its continuing surveillance over the agreements.

Subsequent to its order of approval, the Commission received a telegram from several cruise lines expressing concern over the agreements. It also received the tariff for the interim facilities and a "stipulation of proponents" to resubmit the agreements for further review at the end of the 20-year period for amortization of the bond issue.

Noting its continuing jurisdiction over the agreements, the Commission deemed it appropriate to render a supplement to its order of approval reiterating its finding that a serious transportation need had been demonstrated

by the proponents and noting that the cruise lines did not intend to lodge any formal protests to the agreements, but were concerned only with discussions with the Commission's staff. The Commission also noted its intention to rely on the stipulation of the proponents which it stated had relieved its concern somewhat over the need for any anticompetitive provisions after the repayment of the capital costs of the new facility.

On April 18, 1969 a panel of this Court denied petitioner's motion for a stay of the Commission's order pending review.

SUMMARY OF ARGUMENT

Petitioner lacks the requisite standing to contest the Commission action here since its aggrievement if any is a result of the decision of the City of New York which owns all feasible terminal sites on Manhattan Island rejecting its proposal rather than the Commission's approval of the agreements in question. Petitioner's entrance into the terminal business is at best speculative where it is not now nor has it ever been engaged in such operations. Neither can petitioner condition his standing on the interests of carriers using the facility where no carrier has protested the agreements.

In any case the Commission properly approved the agreement without holding evidentiary hearings where the proponents had demonstrated a serious and urgent transportation need for the agreements and petitioner failed to show the existence of any material issues of fact.

1. PETITIONER LACKS THE REQUISITE STANDING
TO ATTACK THE COMMISSION'S ACTION HERE.

Petitioner in his brief has chastised the Commission for approving the agreements in question without holding full evidentiary hearings on the transportation need for the agreements. Petitioner has failed to state, however, how such hearings would aid him in building a passenger terminal facility, nor has petitioner shown how he is aggrieved by the Commission's approval of the agreements.

Petitioner alleges that the Commission's approval of the agreements effectively precludes him from building a passenger terminal facility. Such is clearly not the case. The City of New York has precluded petitioner from building a terminal on any desirable site in Manhattan Island by rejecting his proposal in favor of that of the Port Authority. The City of New York being the owner of waterfront property suitable for terminal facilities can certainly grant a lease to anyone whom it chooses to build such facility. The selection of the lessee by the City is certainly beyond the jurisdiction and control of the Federal Maritime Commission.

It is clear that the practical effect of petitioner's contentions are to review the decision of the City of New York rejecting its proposal. If petitioner is successful in obtaining deletion of the exclusive use provisions of the agreement here, the Port Authority project will be stopped since without these provisions, the policy of the Port Authority will not allow it to guarantee repayment of the bond issue and without the Port Authority's guarantee, the City will not issue the bonds. Petitioner's

strategy is unavailing since he lacks the aggrievement necessary to attack the Commission's order.

In Fugazy Travel Bureau, Inc. v. Civil Aeronautics Board, ____ App. D.C. ____, 350 F.2d 733 (1965), this Court noted:

In order to be entitled to a hearing it must be shown that the claimant will be adversely affected in a legal or property right.

In that case the Court was faced with a problem similar to the case at bar. There the Civil Aeronautics Board had approved under section 412 of the Federal Aviation Act ^{3/} an agreement between several air carriers allowing collection by airlines from certain travel agents three times a month rather than monthly. Petitioner, a travel agent, protested the approval and sought evidentiary hearings which were denied by the Civil Aeronautics Board. On review this Court held that the travel agent was not aggrieved by the agency action. In the case at bar, petitioner's status does not even reach that which petitioner in Fugazy held. In Fugazy the travel agent was at least affected by the agency action although not adversely. Here petitioner is not affected by the action of the Federal Maritime Commission. Petitioner's aggrievement, if any, is from the decision of the City of New York when it selected the Port Authority's proposal.

Nor can petitioner acquire standing by complaining of alleged injury to carriers who will be users of the facility. No carrier presently

^{3/} 49 U.S.C. 1382(a). Section 412 is the Civil Aeronautics Board's counterpart to section 15 of the Shipping Act.

operating passenger service nor any potential passenger carrier has objected to the Commission's approval of these agreements. Indeed several of these carriers who will be using the new terminal have enthusiastically noted their support for the Port Authority project.

Petitioner in an effort to support its standing relies on the decision in Matson Navigation Company v. Federal Maritime Commission, 405 F.2d 796 (9th Cir., 1968)(Pet. Br., p. 18). There Matson Navigation Company, which was held to have standing to contest a merger of cargo-handling lines, had been in that business for a long time and its entry into the trade served by the merged lines was imminent. Petitioner by contrast has never been in the business here contemplated and its probable entry is at best speculative.^{4/}

^{4/} As we noted earlier, American Dock Co., which owns piers on Staten Island, filed a petition for leave to intervene in the Commission proceeding alleging that it was an "affiliate" of petitioner, and expressing its desire to associate itself with the position of petitioner. An uncontroverted affidavit filed in response to American Dock's petition below showed that American Dock has planned to develop its Staten Island piers as a cargo-handling facility. American Dock has not filed a petition to review the Commission's order nor has it sought to intervene here.

II. THE COMMISSION PROPERLY APPROVED THE AGREEMENTS IN QUESTION WITHOUT HOLDING AN EVIDENTIARY HEARING SINCE PROPONENTS HAVE DEMONSTRATED A SERIOUS AND URGENT TRANSPORTATION NEED FOR THE AGREEMENTS IN QUESTION AND THERE WERE NO SUBSTANTIAL ISSUES OF MATERIAL FACT.

Assuming arguendo that petitioner has the requisite standing to question the Commission's action, the Commission here was correct in approving the agreements without holding an evidentiary hearing because the proponents have demonstrated a serious and urgent transportation need for the agreements and there were no substantial issues of material fact in dispute.

1. The Supreme Court has upheld the Commission's requirement that restrictive agreements should not be approved unless shown to satisfy a "serious transportation need." Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968). Here the Commission has found that such a showing was made. Noting the need for a new passenger facility, the Commission stated:

Passenger facilities at the Port of New York are sub-standard, dilapidated, run-down, inefficient and unattractive. For years it has been recognized by governmental bodies, the steamship industry, and labor interests that ocean passenger service at New York has suffered from these inadequacies. Modern and efficient passenger facilities for New York are essential if ocean passenger vessels are to continue service at that port. (Comm. order, p. 4).

The moving papers of the proponents before the Commission demonstrated that the economic feasibility of the new facility depended heavily on the

consolidation of all passenger traffic. They pointed to the uncertain future of the passenger business. The exhibits to the moving papers included an exhaustive financial study of the ocean passenger business on the basis of projected revenues and showed that the only practical way to provide a new facility would be on a consolidated basis.

The Commission, taking cognizance of this and of all other information before it, noted that "the agreements encompass sufficient transportation benefits in the public interest to warrant their approval. In fact, the transportation need is so clear we consider it essential that the project be permitted to be initiated as soon as possible." (Comm. order, p. 6).

Again, in the supplement to its order of approval, the Commission reiterated its position:

In our earlier order, we approved the agreements and thus the anticompetitive provisions contained therein because the "[p]roponents have demonstrated a transportation need for the agreements." It is clear that the passenger ship carriers are unwilling, and perhaps unable, to enter into long-term fixed leases providing for rentals adequate to permit the City or the Port Authority to finance, build and operate a badly-needed new passenger ship terminal in the Port of New York. The passenger ship traffic has declined on transatlantic runs and there is little prospect for improvement of that portion of the passenger ship business. The cruise traffic is growing but that business has not become sufficiently stabilized to permit cruise carriers to undertake long-term lease commitments. Lacking firm leases from the passenger ship carriers, the only possible self-supporting basis on which the City and the Port Authority could proceed to finance and to build the new terminal is that the carriers be required to use the new terminal to the exclusion of other properties in the City of New York for all of their Port of New York traffic. In light of the policy of the City and the Port Authority

that such terminal should be self-supporting, it is logical for the City and the Port Authority to require carrier commitments for exclusive use of the new terminal on a tariff basis in order for the public agencies to have some assurance that they will recapture capital and operating costs. (Supp. to Comm. Order, p. 3).

Thus, the Commission found, in essence, that without the restrictions which seek to consolidate all passenger vessel services, the badly needed facilities would not be built. The uncertain outlook of the steamship passenger business made the improvement of existing facilities or the construction of new facilities a highly questionable undertaking. Some assurance was necessary that the expenditure of huge sums had a reasonable chance of being recouped. The City owns practically all possible sites for passenger facilities and in the past such facilities have been constructed by the City, rather than by private interests. Historically, the City has required the users of its facilities to execute leases pursuant to which annual rentals were paid so that the City was assured of recouping its expenditures with respect to the facilities. Without such leases, the City will not undertake the badly needed improvement of existing facilities. The users of City-owned piers for passenger operations, on the other hand, are unwilling to sign long-term leases.

The obvious alternative was to build a new terminal under an arrangement which would permit carriers to pay charges on an as-and-when-used basis under a uniform tariff. The Commission found that to make the construction and operation of the new terminal financially feasible, however,

required the consolidation of all passenger operations at the terminal, at least during the period necessary to recover capital and operating costs, i.e., during the term of the original lease.

The Commission, acknowledging the difficulty created by the unusual length of the restrictions, noted, in its original order, its power to monitor agreements which it approves, and to cancel or modify such agreements, notwithstanding its prior approval. But whether or not this power would have been sufficient to justify approval of the restrictions for an additional 50-year period, need not be resolved. For the intervenors have committed themselves to resubmit the agreements for review pursuant to section 15 at the end of the amortization period. The Commission emphasized that, in view of this commitment, the Commission will "at that point review the agreements in light of current circumstances and decide anew whether any continued anticompetitive agreements would be in the public interest." (Supp. to Comm. order, p. 3).

In summary, then, the Commission found that the provisions seeking to consolidate operations were necessary to assure that the new terminal would come into being. Petitioner's objections to the length and severity of the restrictions have been reasonably met. Intervenors' commitment to resubmit the agreements and the Commission's stated resolve to determine at that time the need for further restraints, insures that no restrictions will be approved beyond those necessary to make possible the creation of the needed facilities.

2. On several occasions this Court has held that an agency is not required to hold evidentiary hearings where no material issues of fact are in question and the only dispute is a matter of law. City of Los Angeles v. Federal Maritime Commission, ____ App. D.C. ____, 388 F.2d 582 (1967); Persian Gulf Outward Freight Conference v. Federal Maritime Commission, ____ App. D.C. ____, 375 F.2d 335 (1967).

Petitioner alleges certain factual questions require evidentiary hearings in order for the Commission to render an intelligible decision. It is strange that petitioner failed to point out to the Commission in its protest exactly what factual questions were in dispute. Petitioner itself does not dispute the urgent need for modern, efficient passenger terminal facilities for in its brief it characterizes this proposition as "self-evident." (Pet. Br., p. 34). Nor does petitioner dispute the decline in ocean passenger business:

The ocean passenger business is notoriously declining; one of the prominent signatories has laid up its three famous liners; another threatens the same action eminently; the greatest ship of all is reported in financial difficulties. (Pet. Br., p. 37).

Nor has petitioner suggested that a new facility could be built without a provision restricting operations to the new facility. In short, petitioner has raised no substantial issue of any material fact.

Of particular importance to the issue of whether an evidentiary hearing is necessary, is the recent decision by this Court in Citizens for Allegan County, Inc. v. Federal Power Commission, ____ App. D.C. ____, ____ F.2d ____ (No. 21,842, April 29, 1969). There the Federal Power Commission approved a sale of power facilities by a city and a merger of these facilities with those already owned by the buyer. A group of citizens sought leave to intervene. The Federal Power Commission granted the citizens intervention and also approved the sale and merger at the same time. On review the citizens group contended it was entitled to an evidentiary hearing. The Court held that such hearing was not necessary because no material issues of fact were in dispute. They noted:

[T]he right of opportunity for hearing does not require procedure that will be empty sound and show, signifying nothing. The precedents established, for example, that no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law. (Slip Op., p. 4).

The Court also noted:

It is appropriate to accord more latitude for summary Commission procedures where a public interest determination has been made by a city. (Slip Op., p. 8).

The court placed heavy reliance on the fact that the Federal Power Commission had given considerable weight to the public interest determination made by the City Council:

In the vortex of factors affecting the public interest we think the Commission was entitled, in its determination of public interest, to accord significant weight to the determination made by the City Council, and electorate, if carried out with fair procedures. (Slip Op., p. 8).

Compare, Wiggins v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir., 1966).

Here the City of New York after several public hearings and discussions has made a public interest determination that the requirement features of the agreement are necessary. We see no reason why the Commission should not accord substantial weight to the determination of the City which is directly responsible for promotion of its port.

Petitioner does not rest on the claim that an evidentiary hearing is required in this case, but implies that the Commission can never approve a section 15 agreement without holding an evidentiary hearing. (Pet. Br., p. 30). The practical effect of such suggestion is that section 15 agreements no matter how trivial, whether uncontested or not cannot be approved without hearings. Such reasoning is contrary to the prevailing case law. See City of Los Angeles v. Federal Maritime Commission, ____ App. D.C. ____, 388 F.2d 582 (1967)) and would seriously overburden the Commission in carrying out its regulatory function.

CONCLUSION

For the foregoing reasons, the Petition for Review should be dismissed.

Respectfully submitted,

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U.S. Department of Justice

Federal Maritime Commission

Washington, D.C.
May 13, 1969

APPENDIX A

The pertinent provisions of section 15 of the Shipping Act, 1916,

39 Stat. 733, as amended, 46 U.S.C. §814, provide:

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission, shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, or cancellations....

* * * * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation....

Every agreement, modification, or cancellation lawful under this section ... shall be excepted from the provisions of section 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

APPENDIX B

FEDERAL MARITIME COMMISSION
AGREEMENTS NO. T-2271 and T-2272


STIPULATION OF PROPONENTS

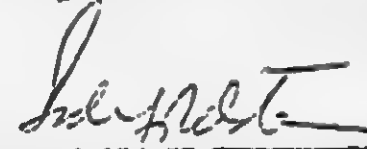
The City of New York and The Port of New York Authority, upon the record before the Federal Maritime Commission in connection with FMC Agreements Nos. T-2271 and T-2272, hereby stipulate and agree, in the interest of the maximum possible protection of the public interest both in regard to the effectuation of a consolidated passenger ship terminal in the Port of New York and in regard to the possible minimization of restrictions on free competition that:

1. The intervenors will resubmit Agreements Nos. T-2271 and T-2272 to the Federal Maritime Commission for review pursuant to Section 15 of the Shipping Act of 1916 at least six months prior to the expiration of the 23-year original term of the letting under Agreement No. T-2271;
2. To serve the same purposes, the intervenors agree to resubmit the said agreements for Section 15 review prior to the expiration of the original term of the letting under Agreement No. T-2271 if at such earlier time the capital cost of constructing the consolidated ship terminal in the Port of New York has been fully amortized both as to principal and interest;
3. The continuance of provisions requiring all carriers who sign Agreement T-2272 to use the consolidated ship passenger terminal exclusively, but on a Tariff basis, for their Port of New York business is essential in order to permit amortization of the capital cost of providing the terminal and as well to meet operating, maintenance and future rehabilitation costs. The amortization period is defined in Agreement T-2271 as extending for no more than the original term of the letting and it is, therefore, appropriate in the public interest to require exclusive use of the facility during that period. The facts and circumstances

which will exist after that period cannot be estimated or predicted with sufficient precision at this time to identify the period beyond the original term during which the other costs would require carrier commitments to exclusive use of the facility. It is, therefore, deemed appropriate by the proponents that the agreements be submitted to the Federal Maritime Commission at or about the time that the original capital cost has been amortized in order to permit informed review and precise identification of the additional period for continuance of the said exclusive commitment; and

4. It is understood that the within agreement to resubmit the agreements as aforesaid is not intended, nor will it be claimed to have the effect of detracting from the continuing powers of the Federal Maritime Commission with respect to agreements subject to Section 15.


CITY OF NEW YORK
By: J. Lee Rankin
Corporation Counsel


THE PORT OF NEW YORK AUTHORITY
By: Sidney Goldstein
General Counsel

May 8, 1969

APPENDIX B

FEDERAL MARITIME COMMISSION

AGREEMENTS NO. T-2271 AND T-2272

ORDER OF APPROVAL

Two agreements (T-2271 and T-2272) have been filed with the Commission for approval pursuant to section 15, Shipping Act, 1916. Agreement No. T-2271, between the City of New York (City) and the Port of New York Authority (Authority), is a passenger terminal lease providing for construction and operation of a new consolidated steamship passenger terminal in New York. The Authority will construct the proposed new terminal on certain waterfront property on Manhattan Island at an estimated cost in excess of \$60 million. Certain interim facilities will be used during construction of the new terminal. All passenger lines using the facility will be assessed dockage, wharfage and fees for other services to be set forth in a tariff of the Authority, which will be applied on a uniform basis. The City and Authority agree to take all possible measures to assure that future passenger vessel operations at New York will be conducted only through the new terminal. The City is cancelling existing leases and both the City and Authority agree not to promote, finance, establish, ~~construct~~, operate or maintain any pier, wharf, bulkhead, dock, terminal or ~~other~~ facilities for the accommodation of passenger vessels, or authorize

any other person to do so. Both agree not to issue work permits, construction approval or consent for construction of a passenger terminal anywhere in their respective jurisdictions.

Agreement No. T-2272, between the City, Authority and several passenger vessel operators serving the Port of New York (Carriers)^{1/}, provides for arrangements for interim terminal facilities, and for use of the new terminal facilities when completed. Carriers signing the agreement will use interim facilities and then the new terminal as set forth in Agreement No. T-2271 for an initial term of 20 years plus an additional term of 50 years. Carriers agree that all of their New York passenger operations will be conducted at the interim terminal and the new terminal. The City and Authority will make no arrangements with other passenger lines which would grant any economic or other provisions more advantageous than those contained in the agreement. All passenger lines will be accepted as signatories to the agreement and no line will be permitted to use the interim or new terminal except as a signatory to the agreement or under other contractual arrangement having the identical effect as the

^{1/} Compagnie Generale Transatlantique (French Line), The Cunard Steam-Ship Company Limited, United States Lines, Inc., Moore-McCormack Lines, Incorporated, Norwegian American Line, and Swedish American Line.

agreement. The Authority agrees that in no event will it exact revenue from Carriers exceeding \$20.00 per passenger average per year.

Notice of the filing of the agreements was published in the Federal Register on February 28, 1969. A protest against approval of the agreements was filed by Marine Space Enclosures, Inc. (protestant). The protest was concurred in by American Dock Company of Staten Island, New York, a company affiliated with protestant. Protestant urges that the agreements are contrary to sections 15 and 16 First, detrimental to the commerce of the United States and contrary to the public interest, and should be disapproved or set down for an evidentiary hearing. Comments were received from other interested parties ^{2/}urging that the agreements are in the public interest and should be approved by the Commission. Certain of these parties urge that the agreement be approved without a hearing by the Federal Maritime Commission.

The Commission has reviewed the agreements, protests and replies and other comments and is of the opinion that the agreements should be approved. Proponents have demonstrated a transportation need for the agreements and it would appear that the agreements are not unjustly discriminatory or unfair or detrimental to the commerce

^{2/} New York Chamber of Commerce; the New York City Council on Port Development and Promotion, comprised of Industry and Labor representatives; The Cunard Steam-Ship Company Limited; French Line; and the International Longshoremen's Association, A.F.L. - C.I.O.

of the United States and are not contrary to the public interest.

The only protestants against approval of these agreements are Marine Space Enclosures, Inc., the proponent of an alternative passenger terminal plan, and American Dock Company, an affiliate of Marine Space Enclosures, which owns five piers on Staten Island which we have reason to believe are being planned for cargo operations. The particular interests of the protestants appears to be indirect and remote.

New passenger facilities are clearly needed at the Port of New York. Practically all possible sites for such facilities and other passenger terminal property in New York are owned by the City. The Authority is expert in the field of terminal construction planning and operation. It is only logical that if a new passenger terminal is to be provided at the Port of New York, it would in all probability be provided by either the City, or the Authority, or as in the case in Agreement No. T-2271, both parties, through use of public funds. In the past no passenger terminal facilities in New York have been provided by private interests.

Passenger facilities at the Port of New York are sub-standard, dilapidated, run-down, inefficient and unattractive. For years it has been recognized by governmental bodies, the steamship

industry, and labor interests that ocean passenger service at New York has suffered from these inadequacies. Modern and efficient passenger facilities for New York are essential if ocean passenger vessels are to continue service at that Port.

This project has been the subject of three public hearings in New York. Virtually every entity representing the public and maritime interests at New York have supported this proposal and these agreements. Representatives of passenger lines, maritime labor, the Department of Transportation, the Bureau of Customs and other maritime interests strongly supported construction of the proposed new passenger terminal. No passenger lines appeared in opposition. The only opposition was from protestant, a real estate developer, who presented an architectural "rendering" of a project which would include passenger terminal facilities. Protestant states that it has plans to construct a major complex of dwellings, hotel and office units, built over subaqueous parking, and ancillary facilities on the waterfront of the City of New York and that such plans include construction of an advanced terminal for passenger lines. The proposals of protestant were rejected by officials of the City of New York.

We are persuaded that these factors demonstrate that the agreements encompass sufficient transportation benefits in the public interest to warrant their approval. In fact, the transportation need is so clear we consider it essential that the project be permitted to be initiated as soon as possible.

Agreements T-2271 and T-2272 are unique, and involve relationships and obligations which in their present form have not heretofore been subject to Commission consideration by virtue of its authority under section 15 of the Shipping Act, 1916. Consequently, the Commission reminds the parties to the agreements of the obligations which they undertake among themselves and toward the public interest. Commission approval of an agreement under section 15 grants the agreements and its parties anti-trust immunity for activity which otherwise would be subject to scrutiny and possible other action under our federal anti-trust laws. This result warrants special mention here, not only because of the unique nature of the agreements, but because of certain clauses and provisions in the agreements which are of especially anti-competitive character and effect. Standing alone this does not require disapproval of the agreements or portions thereof. It does require, however, that the Commission emphasize its jurisdiction over agreements once they receive Commission approval.

Under section 15 of the Shipping Act, 1916, the Commission retains full power of surveillance over approved agreements as a

condition of approval. The Commission, after approval, retains the power to "cancel or modify any agreement, or any modification. . . thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair. . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act, 1916. . ."

In addition to this continuing surveillance, the Commission's jurisdiction over section 15 agreements includes the settlement of disputes arising out of the operation and implementation of such agreements. Any aggrieved party, whether or not a party to the agreements, may avail himself of the formal or informal procedures established by this Commission for the hearing of disputes, complaints or other disagreements as to the effect, operation or implementation of section 15 agreements.

So that the Commission may be able to properly exercise its continuing authority with regard to approved section 15 agreements, we require complete information as to their operation. This is especially true with agreements such as T-2271 and T-2272 which contain particularly anti-competitive provisions. Consequently, the Commission will require the parties to the subject agreements to keep the Commission informed of the internal and external

operations of the agreements. The information will be demanded as the Commission deems necessary or on a periodic basis. It will be submitted through written reports, the submission of specified data or operating records, or obtained by investigation by the Commission or in any other manner within the present or future authority of the Commission.

Tariffs covering dockage, wharfage, and other terminal service fees applicable at the interim and new passenger terminals shall be filed with the Commission. Such tariffs and any changes thereto shall be filed on at least 30 days advance notice, unless the Commission for good cause shown shall grant special permission for changes on less than thirty days.

IT IS THEREFORE ORDERED, that agreements No. T-2271 and T-2272 are hereby approved pursuant to section 15 of the Shipping Act, 1916. By the Commission, April 7, 1969.



Thomas Lisi
Secretary

(SEAL)

APPENDIX B

FEDERAL MARITIME COMMISSION

AGREEMENTS NOS. T-2271 and T-2272

SUPPLEMENT TO ORDER OF APPROVAL

By order dated April 7, 1969 the Commission approved pursuant to section 15 of the Shipping Act, 1916, Agreements Nos. T-2271 and T-2272 under which the City of New York, the Port of New York Authority and the passenger ship carriers serving the Port of New York have arranged for the construction and operation of a new consolidated steamship passenger terminal in the Port of New York. In our order of approval, we noted that we would continue close supervision over the agreements because of the anti-competitive features therein. The Commission's order of approval of these agreements is presently being reviewed by the United States Court of Appeals for the District of Columbia Circuit.

On April 25, 1969, we received a telegram from seven passenger carriers, primarily cruise lines, who represent that they are major users of the facilities covered in Agreement No. T-2271. The telegram states that the carriers:

strongly feel that further discussions are necessary regarding the project in view of the changing cost picture and unresolved apportionment of expenses as well as impossibility to choose alternate docking facilities in New York.

The carriers requested a meeting in order to expand their views on this matter. The Commission suggested an early meeting on this matter, but the carriers due to absence of officials of several of the carriers were unable to meet until May 14, 1969. Inquiry by the Commission's staff indicates no desire on the carriers' part to consider this as a formal protest.

On April 29, 1969 the New York Port Authority filed tariff pages covering rates and charges applicable for the interim terminal facilities to be effective not earlier than June 1, 1969.

On May 8, 1969 a document entitled "Stipulation of Proponents" was received. Contained in this document was a stipulation between the City of New York and the New York Port Authority entered into at the suggestion of the Department of Justice to resubmit the agreements for Commission review at least six months prior to the termination of the original lease term of 23 years.

The aforementioned information, in light of our continuing jurisdiction, necessarily requires further comment on our part, however, in no way does this affect the Commission's original order of April 7.

The cruise lines express concern over the "impossibility to choose alternate docking facilities". This again brings to light the question of the exclusivity provisions of the agreement, as does Item 870 of the tariff requiring carriers using the interim facilities to comply with the provisions of Agreement No. T-2272.

In our earlier order we noted our concern over the anticompetitive features of the agreements. Of particular concern was the provision of Agreement No. T-2272 allowing for a possible exclusive use of the facility for 73 years. The principal objective of this provision is to insure recapture of the original capital costs. Of this 73-year period of exclusive patronage, the first 23 years are necessary for the repayment of capital costs through the amortization of the bond issue. This initial period is certainly necessary at least to insure the threshold success of the project.

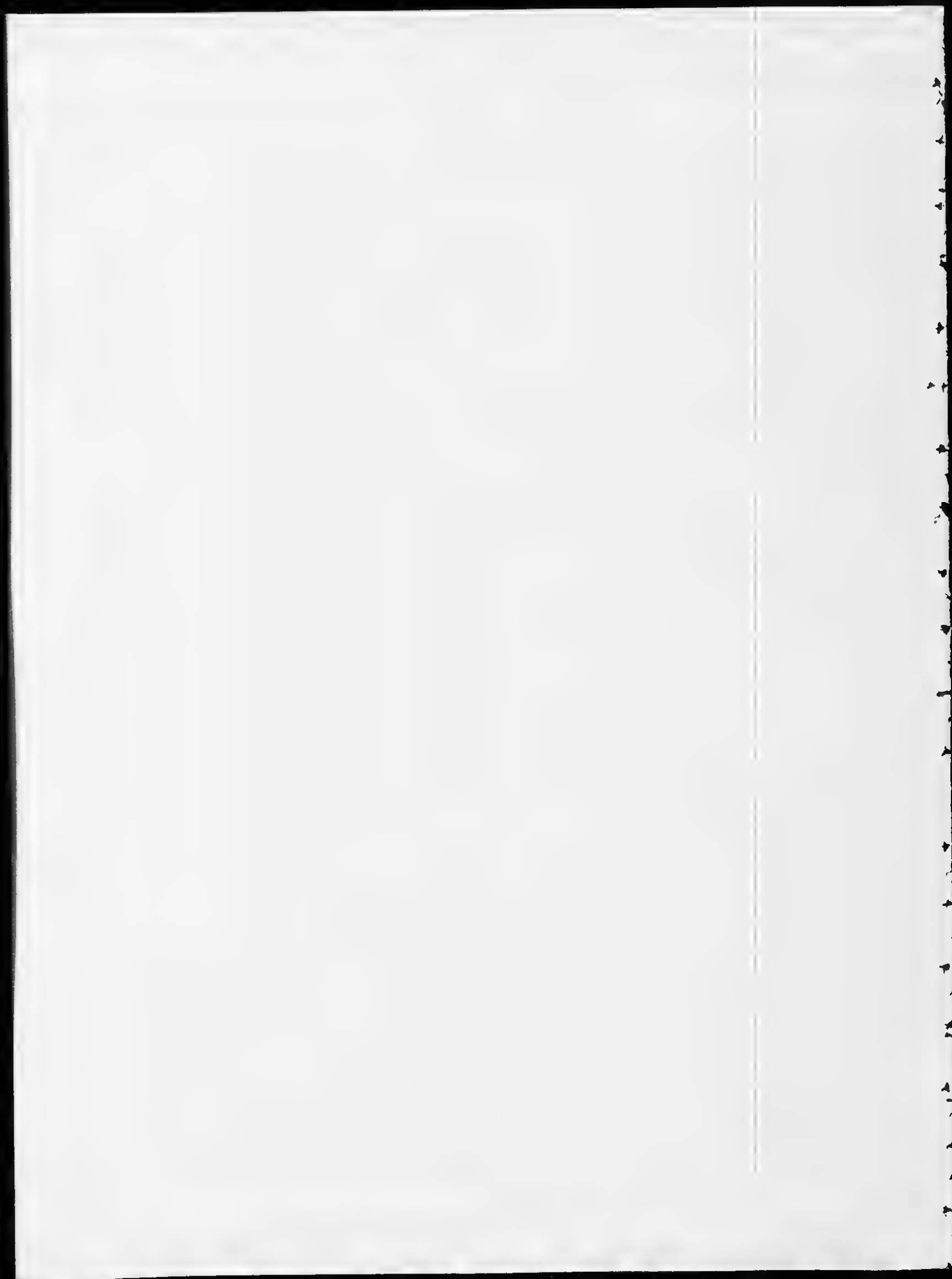
In our earlier order, we approved the agreements and thus the anti-competitive provisions contained therein because the "p/roponents have demonstrated a transportation need for the agreements". It is clear that the passenger ship carriers are unwilling, and perhaps unable, to enter into long-term fixed leases providing for rentals adequate to permit the City or the Port Authority to finance, build and operate a badly-needed new passenger ship terminal in the Port of New York. The passenger ship traffic has declined on transatlantic runs and there is little prospect for improvement of that portion of the passenger ship business. The cruise traffic is growing but that business has not become sufficiently stabilized to permit cruise carriers to undertake long-term lease commitments. Lacking firm leases from the passenger ship carriers, the only possible self-supporting basis on which the City and the Port Authority could proceed to finance and to build the new terminal is that the carriers be required to use the new terminal to the exclusion of other properties in the City of New York for all of their Port of New York traffic. In light of the policy of the City and the Port Authority that such terminal should be self-supporting, it is logical for the City and the Port Authority to require carrier commitments for exclusive use of the new terminal on a tariff basis in order for the public agencies to have some assurance that they will recapture capital and operating costs. Although we were somewhat troubled by the necessity of the exclusivity provisions beyond this period we were not unmindful of the fact that the agreements in question are lawful only and so long as approved by us under section 15. The proponents of the agreements have eased our concern somewhat by their submission of a stipulation to resubmit the agreements at the end of the amortization period. In view of this stipulation the Commission will at that point review the agreements in light of

current circumstances and decide anew whether any continued anticompetitive agreements would be in the public interest. This, we believe, will insure the protection of the public interest and it also demonstrates further the desire and objective of the proponents to serve the interests of the commerce of the Port of New York without imposing any unnecessary burden on the passenger ship carriers.

We again remind all concerned parties of our continuing surveillance over the agreements and the tariff in question and the availability of informal and formal procedures for the settlement of disputes arising therefrom.

By the Commission, May 12, 1969


Secretary



UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22,936

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 23 1969

MARINE SPACE ENCLOSURES, INC.

Petitioner

v.

FEDERAL MARITIME COMMISSION
and
UNITED STATES OF AMERICA

Respondents

Nathan J. Paulson
CLERK

PETITION FOR REVIEW

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. PLAINTIFF HAS STANDING TO SEEK REVIEW

The respondents and intervenors alike challenge plaintiff's standing to review the Commission's order.

The reason stated by respondents is rather outside the usual run of such challenges, namely, that petitioner suffers not from that order but from the action of the City, which "has precluded petitioner from building a terminal on any desirable site in Manhattan Island".^{1/} Respondent's brief 7. The argument is that the City has plenary power to deny the use of its property, and that its selection of an exclusive lessee is beyond the Commission's jurisdiction and control; hence, "Here petitioner is not affected by the action of the Federal Maritime Commission. Petitioner's aggrievement, if any, is from the decision of the City of New York when it selected the Port Authority's proposal." R.br. 8.

Remarkably enough, the challenge by the intervenors to petitioner's standing raises only conventional questions in this category, and evinces no disposition to disclaim or to undervalue the shield of §15 approval that the Commissioner's order

1. Respondents are not saying here, as intervenors persistently say, that petitioner is seeking to review the award of the actual site of the Port Authority's proposed terminal. Petitioner has throughout recognized the City's right to award that site as it sees fit. Petitioner's protest has been directed against the exclusion of all competitive facilities, augmented by the tying provisions of the agreements. Respondents rightly admit that the City has closed off Manhattan Island - and much more.

has erected. Intervenor's brief 17 ff.

Neither attack is sound.

A. THE ARGUMENT OF RESPONDENTS

1. The argument of respondents must be that if the City has plenary power to deny the use of its property, it may by contract with a favored lessee agree to exercise this plenary power against all others.^{2/}

First, the true context must be established. These agreements reach far beyond the use of city property; they not only forbid the City to exercise reciprocal power to lease to others, but they also require the City to forbid others to use their own property competitively, and they compel all carriers, the whole passenger market, to use only the single permitted terminal. Does the Commission say that none of this is within its jurisdiction and control under §15? But the Commission did take jurisdiction, in accordance with the plain words of the statute and a long line of precedents: Can it now disclaim jurisdiction in order to defeat review of its act of approval?

Second, the question is not whether the Commission can command the City to grant plaintiff a site or to permit plaintiff to use its own property or terminal. Assuming the

2. On its face the argument proves too much: if the City can deny the use of its property it can presumably condition such use. If it is immune to §15 it is also then immune to §17, 46 U.S.C.A. §816. This result is too absurd to maintain. *California v. United States*, 320 U.S. 577 (1944); *Los Angeles v. FMC*, 385 F.2d 678 (C.A.D.C. 1967).

Commission cannot do that,^{3/} it certainly does not follow that §15 requires it to sanction an agreement with a rival operator whereby the City promises to refuse such a grant or permit. On the contrary, the Commission can disapprove an agreement that lays down such a requirement, just as it can disapprove the other exclusive and tying provisions, all on settled principles of the Shipping Act. Curiously, the Commission has approved, thereby saying to the City affirmatively what counsel pretends it could not say negatively: You may contract to exclude petitioner from the market by refusing him either a lease on your property or a permit to use his own, and by forbidding all carriers to patronize him.

Viewed in this light, the argument of respondents translates into the assertion that the petitioner's aggrievement flows not from the order, but from the agreement which the order approves, a distinction surely impossible to defend. What aggrieves petitioner substantively is deprivation of its right to enter the terminal field by a flat prohibition to construct even on its own property in Staten Island, and by a compulsion tying the whole market of carriers exclusively to the monopoly terminal; that deprivation stems directly

3. In *Ballmill Lumber & Sales Corp. v. Port of N.Y. Authority*, 10 S.R.R. 131 (FMC 1968), the Commission in fact did exactly what its counsel says it cannot do here: it said to the same Port Authority, You may not allow one lessee to operate a public terminal without permitting its competitors to do so also; if you allow one you must allow all, even if "it is not at all clear that Ballmill or other tenants would have the necessary resources or even the desire to operate a public terminal" (at 139).

from the agreement; and the agreement has legal immunity only under the Commission's order of approval. It is in that direct sense that the order aggrieves petitioner.

2. Respondents also say that the petitioner lacks standing to complain of the injury to carriers compelled to use the monopoly terminal.^{4/} R.br. 8. This statement is erroneous in law even as literally formulated.^{5/} But we are also entitled to complain of the clauses that threaten discrimination against carriers unless they yield exclusive patronage simply because the threat will work, and exclusive patronage for the monopoly facility preempts and forecloses the whole passenger market to which petitioner must look. The order approving the compulsion upon the carriers is therefore a direct aggrievement to petitioner, which it has standing to attack before this Court.

B. ARGUMENTS OF INTERVENORS

The arguments of intervenors go along conventional lines that petitioner suffers no legal wrong and no direct impact, especially pecuniary. Port Authority's brief 17 ff.

4. Respondents rejoice a little prematurely over the absence of carrier complaint, R.br. 9. Six lines, carrying 40% of the traffic, have applied for relief to this Court.

5. The whole line stemming from FCC v. Sanders Bros., 309 U.S. 470 (1940); Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942); and FCC v. NBC (KOA), 319 U.S. 239 (1943), is to the contrary, especially since the Administrative Procedure Act. 3 Davis, Administrative Law Treatise, §22.05. Compare the Second Circuit doctrine of private attorneys general, Associated Industries v. Ickes, 134 F.2d 694 (1943); Reade v. Ewing, 205 F.2d 630 (1953); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (1965).

1. The three cases cited in this context, *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (1955); *Pennsylvania RR Co. v. Dillon*, 335 F.2d 292 (1964); and *Fugazy Travel Bureau v. CAB*, 350 F.2d 733 (1965), are authority in the traditional line of *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939), and *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938). This line is to the effect that persons suffer no justiciable legal wrong if the injury of which they complain consists in subjecting them to competition, however painful or even illegal.

Our case is the exact opposite. Petitioner seeks not to be free from competition but to be allowed to compete. It is the intervenors that seek to be free from competition.

The whole weight of this line of cases depends on the public policy favoring and protecting competition. Section 15 has the same fundamental object, as the Commission repeatedly reminds us in its decisions. Petitioner stands as seeking to be allowed to compete in the passenger terminal business, which it has a legal right to do under the public policy of the nation. It stands squarely within the class protected by the law. Unless the Commission's order, which deprives him of that right, is correctly decided under the law, he suffers legal wrong within the meaning of all the canons covering review, including the Administrative Procedure Act and the various decisions cited.

2. When a party is directly affected by an order and has a legally protected right, he has standing to review, without more. Intervenors, however seem to contend that a showing

of pecuniary damage is also required. *Contra*, *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (1965), and extensive annotation at 615.

a. Where the complaint is denial of the legally protected right of entry, measurable pecuniary loss cannot be the test. The financial value of opportunity denied is not always susceptible of measure in the same sense as in a breach of contract. It would be an anomaly if this protected right could be defeated by the very act that illegally invades it. That would be the effect if intervenors could, by force of the Commission's order, first prevent petitioner from building and operating a terminal, and then escape review on the ground that petitioner does not own and operate a terminal.

b. A more realistic test might include an inquiry as to the seriousness of petitioner's plans to enter. That might present, in any given case, an issue of fact, bearing upon bona fides and excluding volunteer intervention in public affairs. Intervenor appears to be making some such point, PA Br. 20-21, in the midst of a vituperation based on several misstatements of fact and on other matter dehors the record.^{6/} Of course, we do not see why the Commission

6. For instance, it is quite untrue that "petitioner, until filing of its brief here, was insistent that it would carry out its conception on City-owned property already leased to others", Port Authority's brief 21. Petitioner has from its first submission to the Commission acknowledged that the City has disposed of that property, and has sought only to protect its access or rights to other property. The question has therefore never been of providing an "alternative" to the Port Authority plan, but of providing a competitor. The whole

should particularly doubt the good faith or the technical, mechanical and financial ability to carry through its proposals of a consortium consisting of petitioner (no insignificant grouping in its own right), United States Steel Corporation and Morrison-Knudsen Corporation, altogether scarcely the fly-by-night figure that intervenors conjure up. But at the least, when such a consortium represents that it is planning such a project, it is entitled to expect the Commission to investigate this allegation before accepting the denial of another party; indeed, in a proceeding that partakes of the nature of a motion for summary judgment by such other parties, the affirmative allegation is what the Commission should have accepted as true.

Buttressing their reputation was the representation of petitioner that the group were ready to press forward with essential engineering site-feasibility studies at substantial cost to themselves. In a case in which a planner is faced with a dead stop that totally excludes him from the field, the question of whether his plans have reached the requisite

6 (cont'd.) brief of the intervenors treats petitioner as being in effect one of its associates; yet some statements that would be true of petitioner, a newly-formed corporation, are not true of its associate and affiliates, which severally or collectively do own or have owned substantial marine property in the Port of New York including a passenger terminal. Since the intervenors permit themselves the contrary assertion from outside the record, id. 20 and elsewhere, perhaps the Court will overlook our correction. The Port Authority, we may add, has never operated a passenger terminal.

maturity should be judged by a more indulgent standard. No one will ever get a step farther if these agreements stand; no one can be expected to invest millions merely to buy a law suit, and we submit to the Court's consideration that if a litigant can acquire standing only by building a project that, as matters stand, is illegal, no challenge to these agreements will ever appear on this Court's calendar.

We again invoke *Matson Navigation Co. v. FMC*, 405 F.2d 796 (C.A. 9, 1968), and the underlying Commission decision at the examiner's level, reported at 9 S.R.R. 191, 223, 229 (1967), for a case in which the expectation of entry into a given trade was deemed to confer standing.^{7/}

II. ARGUMENTS ON THE MERITS

The remainder of respondents' brief, pp. 10-17, is exiguous. It argues in outline that the Commission had information showing "that the economic feasibility of the new facility depended heavily on the consolidation of all passenger traffic", p. 10; that it found "in essence, that without the restrictions which seek to consolidate all vessel services, the badly needed facilities would not be built", p. 12;^{8/} that no other evidentiary hearing was required because "petitioner failed to point out to the Commission in

7. The decision is probably at variance with this Circuit's *Dillon and Fugazy* line cited supra p. 5, being more nearly consistent with *Curran v. Clifford*, 8 S.R.R. 20,298 (C.A.D.C. 1968). However, we do not invoke the decision for that purpose.

8. This part of the argument depends on the Commission's supplemental order of May 12, 1969, which we have moved to strike.

its protest exactly what factual questions were in dispute",
p. 14.

Broadly, the intervenors seem also to be saying that there were no real issues of fact, that the Commission had an adequate record before it in the pleadings, and that it decided correctly in a decision sufficiently detailed in respect of findings and reasoning to satisfy §§ 8(b) and 10(e) of the Administrative Procedure Act, 5 U.S.C.A. §§ 557(c) and 706.

We respond by first setting out the issues of fact in the case.

A. ISSUES OF FACT

Section 15 requires disapproval of agreements found by the Commission to be unjustly discriminatory or unfair between carriers (among others), or detrimental to commerce, or contrary to the public interest, or in violation of the Act. P.br. App. A. Petitioner raised issues on each of these grounds. It showed that:

(1) Paragraph 9 of T-2272 provides that some carriers will be served at the proposed terminal and others will not, and that the only basis for the difference in treatment is that the former promise to patronize the terminal exclusively for 73 years. Petitioner's allegation was that there is absolutely no difference in the cost or value of the actual

terminal service to be rendered to either carrier's ship, that is, no difference in transportation characteristics of the service; this is the classic case of unjust discrimination between persons, forbidden since the dawn of regulation of carriers and similar entities affected with the public interest. We specifically cited recent cases of the Commission reaffirming this fundamental rule, which are summarized in petitioner's main brief 20, 25-28 (to which, it is noticeable, respondents do not even attempt an answer). Petitioner's allegations did more than "raise issues of fact": it really established a prima facie case, upon which if no offsetting facts could be proved, it was entitled to prevail, under the Commission's own precedents.^{9/}

(2) The agreements create detriment to commerce by depriving New York of a variety of terminal services essential to healthy commerce, by depriving carriers of access to competitive terminals, and requiring them to patronize exclusively a high-cost terminal. These were preeminently economic issues, issues of fact. The pleadings of the intervenors themselves admitted that serious difficulties were being encountered in satisfying more than two-thirds of the carriers, Exhibit 6.

9. Petitioner was entitled to raise this issue, we repeat, because the carriers coerced by this rule represented the whole market available for competition.

The respondents' incautious insistence that the project enjoys the enthusiastic endorsement of the carriers, R.br. 8-9, can scarcely have been dry when one-third of them, carriers of over 40% of the trade, sought leave to intervene herein on the simple ground that the new costs about to be thrust upon them will cause them severe loss or drive them from New York. The danger of brushing off petitioner's allegations, verified as they were by the showing of intervenors themselves, is surely illustrated here: a Commission charged with the high duty of supervising agreements to preclude detriment to commerce should either have expertise or strong routine investigative procedures for ascertaining the facts and guarding against mistakes so flagrant as this; failing both, it should at least allow hearings to responsible protestants, in order to open for itself a traditional channel to the facts. Can it any longer be pretended that the carriers enthusiastically endorse these agreements, and that there are no disputes of fact concerning them?

(3) The agreements are contrary to public policy because, in violation of that policy, they destroy free competition among terminal operators and require carriers to give exclusive patronage to a single terminal. Here petitioner had the benefit of a line of Commission cases and the fresh,

authoritative Svenska decision of the Supreme Court establishing that agreements violating the antitrust laws are presumptively unlawful under § 15; here, therefore, it also did more than "raise issues of fact"; it established a prima facie case, which only offsetting facts concerning transportation need could outweigh. We had also the benefit of fresh cases by the Commission explicitly rejecting just such contracts as are involved here when advanced by other cities (to which, we notice again, the respondents also make no reference in their brief). Their effect is totally to outweigh the defensive allegations intervenors have assembled and which the respondents seem to have accepted. See petitioner's main brief 31-33.

It is beyond understanding that profound economic issues of this scope should be disposed of on moving papers in contradiction of all Commission precedent. Whether the terminal required support of guaranteed patronage; whether if so it required 100% of all potential business (on the face of it, 66% would provide the claimed necessary income); whether alternative methods of support were available; whether it was true that carriers would not agree to the leasing methods traditional in New York; why a bar to other terminals and carrier exclusive patronage were necessary at all if intervenors were so sure no one else, including petitioner, would or could

build competitive facilities and all other existing facilities were to be closed down: these fundamental questions of fact were present and urgent. The intervenors' answers were accepted by the Commission on faith, and as well the ultimate conclusion, now destroyed beyond reconstruction, that this particular terminal is an essential transportation need instead of a white elephant whose care and feeding will ruin many of the carriers upon whom it is to be foisted.

(4) Finally, the agreements violate § 15 in violating § 16 First, by (a) preventing petitioner from operating a public terminal, and (b) refusing service to any carriers other than those who give exclusive patronage to the Port Authority terminal. Here, too, petitioner was able to cite fresh Commission authority (once again ignored in the opposing briefs) establishing that it is unreasonably and unduly prejudicial for a municipality to refuse one party the right to operate a public terminal while conferring it on another, and that it is unreasonable to accord preference in service to regular customers. See petitioner's main brief, 37-39. Again, petitioner did more than "raise issues of fact": it established a prima facie case, which only offsetting facts could outweigh.

B. THESE ECONOMIC ISSUES OF FACT COULD ONLY
BE RESOLVED BY FULL HEARING, OR IF SUM-
MARY PROCEEDINGS WERE APPROPRIATE, BY
DECIDING THEM AGAINST INTERVENORS

The thrust of petitioner's allegations on these issues was to create a prima facie case in fact and law that the agreements were illegal under § 15. Neither respondents nor intervenors seem to grasp the legal significance of that circumstance. It meant that unless the prima facie cases were rebutted by substantial evidence, the agreements must be disapproved. *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 246 (1968); and see cases collected in petitioner's main brief, 20. Thus, apart from all questions of fair opportunity to be heard, summary disposition, if resorted to at all, should have been in petitioner's favor, not against it.

1. If anything is clear about the order under review, it is that no evidence whatever was before the Commission to offset petitioner's allegations of unjust discrimination and unfairness, detriment to commerce, and violation of § 16 First. The Commission's conclusory finding on the first two of these issues, couched merely in the words of the statute, and its total omission of reference to the third, fail utterly to satisfy established standards of judicial review.^{10/}

10. We need not invoke the cases that reject post-hoc rationalizations by counsel, who have attempted none. As for

The only matter presented to the Commission by the intervenors, following petitioner's protest, related to the need for a new terminal, which the Commission treated as satisfying the public-interest standard of § 15.¹¹/ The opposing briefs attempt to bridge the gap by arguing that the moving papers contain "evidence" that only by exclusive tying arrangements could the Port Authority's requirement be met of a self-liquidating investment, and that "consolidation" was a requirement of city planning. Passim. No paper certified to this Court by the Commission as part of its record contains any such "evidence"; some of these allegations appear for the first time in the brief of intervenors; the brochures attached to their original responses to petitioner's protest (petitioner's Exhibit 4, Attachments A, B¹²/) are bare of all but these argumentative conclusions: "Instead of the present practice of leasing piers on

10. (cont'd.) the efforts of intervenors, PA br. 40-44, we deal with them below; here it suffices to say that, vituperation apart, they do not treat the merits.

11. The supplemental order of May 12, 1969, undertook to fill up the logical gap pointed out in our main brief. We have moved to strike the parts of the opposing briefs that depend on this order.

12. The Court may forgive us for chuckling at the "artists' renderings" (Attachment A, p. ii) illustrating these brochures, considering the abuse of petitioner's "renderings" that appears throughout these papers, and seeps into the Commission's order under review. Evidently one man's rendering is another man's artistry.

a long-term contractual basis, the most feasible way for the ship lines to pay for the use of the new terminal would be on a ship-by-ship basis with a tariff of dockage and wharfage charges." Attachment A, p. 99. "It is believed that further analysis and discussion with the ship lines will indicate that the new consolidated terminal, with its vastly improved facilities and amenities would offer substantial advantages and economies to the ship lines and, as well, many advantages to their passengers, waterfront workers, and the public at large, which would more than justify this additional expenditure." Id. 102. "The new terminal, when completed, would be operated by the Port Authority on a consolidated basis. *** As in the original proposal, it is assumed that the present practice of leasing piers on a long-term basis will be discontinued in favor of a system under which the ship lines will pay for the use of the terminal on a ship-by-ship basis according to an established tariff of dockage and wharfage charges. The City, the Port Authority and the ship lines would agree that any vessel in the passenger service calling at New York would be required to use the consolidated terminal." Attachment B, p. 37. [Emphasis added.]

What "evidence" do these documents contain of the propositions now urged by intervenors? The last sentence

quoted is the only reference to exclusive patronage in either document, and it is unaccompanied by a shred of reasoning, discussion or explanation, let alone basic information. Nor do the response and supplementary response of intervenors to petitioner's protest, petitioner's Exhibits 4, 6, do more. The barest conclusory statement might be read in the latter: "It is obvious that the Carriers understand the essentiality of the requirement that to the extent that the parties can do so, they will commit their efforts and activities solely to the public consolidated ship terminal. None of the Carriers have protested this requirement or any other provision of the agreements." Petitioner's Exhibit 6, p. 11; emphasis added.

Attached to that document, as petitioner at once pointed out to the Commission, was evidence squarely contradicting this representation. Petitioner's Exhibit 6, attached telegram of March 1, 1969, from one Lukens to twelve lines, and letter of Italian Line to Lukens dated March 20, 1969. These showed that two-thirds of the lines had serious enough objections to refuse to sign, and that there was even a major disagreement about the design of the piers, deemed actually unsafe by the most important single line.

If the Commission was not alert enough a guardian of the public interest, or skillful enough a technical agency,

itself to ferret out the underlying facts, now at last crystallized in open court, should it not have recognized from these signs of deep discontent, actually before it, that the agreements presented a genuine controversy? How could it reasonably have contented itself with the cool observation that "No passenger lines appeared in opposition"? The theory of an expert regulatory agency, guarding the public interest and not merely calling balls and strikes, *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 620 (C.A. 2, 1965), is subverted when it closes its eyes to matters squarely before it, properly raised by a responsible protestant, against which appear the merest conclusory allegations of proponents. The Commission's brief findings were based on those conclusory allegations, and contradicted as they were by the only real evidence (i.e., the record of actual exchanges between the parties), cannot be sustained.

2. We have showed that (1) the Commission made no findings to sustain its conclusion that the agreements did not offend against the unjust-discrimination and detriment-to-commerce clauses of §15; (2) did not even mention the "violation-of-this Act" clause (referring to §16 First); and (3) made findings on the issue of public interest on the basis of conclusory allegations of intervenors squarely contradicted by the only evidence before it.

In this connection, we notice an argument of intervenors, PA br. 40-44. Recognizing the weakness of the order

in respect of the first two of these points, they suggest that a finding of transportation need (for the agreements, which by now they concede is the necessary finding, rather than for the terminal alone) is sufficient to support agreements otherwise unjustly discriminatory, or unduly prejudicial, or detrimental to commerce. They cite no authority.

Transportation need is a conception fashioned by the Commission in connection with the public-interest clause. "The Commission must of course adduce substantial evidence to support a finding under one of the four standards of §15, but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest', unless other evidence in the record fairly detracts from the weight of this factor.... We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory 'public interest' standard." *FMC v. Svenska*, 390 U.S. 238, 246 (1968). "The Commission has formulated a principle that conference restraints ... will be approved only if the conferences can bring forth such facts as would demonstrate that the *** rule was required by a serious transportation need necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." At 243.

The four standards of §15 against which agreements must be measured are stated disjunctively. They must each

be satisfied. A clause not required to be disapproved as detrimental to commerce may fail as unjustly discriminatory. The value of a facility to transportation may be set off against the public interest in free competition, but not against the right to be free from unjust discrimination. Equal charges for equal service would still be required; and if the only way to finance this valuable facility were to charge some ships two times as much as others for identical service,^{13/} the agreement must fail. For "unjust discrimination" has its own long established meaning, related to the cost and value of service.

The same distinctions and traditions apply to each of the disjunctive clauses of §15. Introduction of the public-interest clause in 1961 was intended to add a new requirement for approval, and did not swallow up the other three. The Commission's "elaboration" of transportation need relates exclusively to this clause.

It follows that it was required to make specific and more than perfunctory findings in each clause put in issue by petitioner, and that "transportation need" could not satisfy all.

We must again remark that if the Commission had really adapted the proposition urged by intervenors, a complete new departure in construction of the statute, it ought at least

13. This may already be happening under the Port Authority's first tariff.

to have said so, and ought to have explained its own reasons, even if it persisted in refusing to allow petitioner to argue the issue.

3. Intervenors cite a number of cases, which are distinguishable. *Savon Gas Stations v. Shell Oil*, 309 F.2d 306 (C.A. 4, 1962), involved a restrictive covenant against competition by a landlord within an area of three square blocks; within that area, "there were at least 10 service stations" of all the well known brands (at 309). In *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), the contract was nonexclusive, was held to have no tendency to foreclose competition, involved no dominating seller, and represented less than 1% of the market. These Sherman Act cases are quite different from the present situation, in which the whole market is to be preempted, there is to be no outside competition, there will be one seller only, and the arrangement is absolutely exclusive.

We have maintained the necessity for hearing in a case involving fundamental questions of monopoly and in which prima facie the agreements violate all clauses of §15. Respondents and intervenors invoke *Citizens for Allegan County v. FPC*, No. 21,842, April 29, 1969, as holding that a federal regulatory agency may defer to a city's determination of public interest and refuse any hearing, even briefs and arguments, to persons aggrieved. The Court's admitted difficulties with the case, which led it to narrow its ruling to the specific facts (slip op. 2), suggest that it did not expect to be faced

so promptly with a claimed parallel.

We submit the following substantive distinctions:

(1) The rule would not apply in antitrust litigation or where "an agency is considering approval of a merger or other issues of consolidation of control" (p. 5); here the whole issue is monopoly of shipping facilities and patronage in an antitrust setting. (2) The agency hands down a careful opinion addressed to each of the problems raised by petitioner, with reasons for concluding against it (pp.5-6); here the Commission's order was cursory and perfunctory, so far as it went, and entirely passed over substantial issues. (3) The decision of the city government, endorsed by a referendum, was partly political in character, the purpose of getting the municipality out of the electric business being held to involve considerations of political and economic philosophy (p.7); here the fact that the direction of ownership is the exact reverse is of decisive importance, because the method chosen clashes fundamentally with the interest confided to the Commission, namely, the protection of free competition; and the object of the Commission in allowing an invasion of that interest, namely, to procure off-setting transportation benefits, is different from the city's wish to guarantee its investment, which is a simple monopoly purpose. (4) The political decision is not decisive, but one factor considered by the regulatory agency, and on the issue of public interest only (p.8); here the Commission, which according to the certified record had no specific knowledge of the City's proceedings,

and no transcript of the public hearings to which it referred in its order, relied entirely upon the city's determination, as recounted to it by intervenors without independent verification, and passed only perfunctorily or not at all on other issues crucial to the Act. (5) The objections, when carefully reviewed by the Court, are not weighty; we submit such review will show the reverse here.

These differences sufficiently distinguish a decision troublesome to the Court itself, which limited it to its own facts.

4. Throughout the brief of intervenors, as throughout their pleadings before the Commission, they have evinced confusion on the interplay between petitioner's right to build and their desire to preserve exclusive control of all passenger movement in New York harbor.

The different positions of intervenors on this point are bewildering. They say petitioner could not build because no one but the City ever has, and then assail petitioner because it might succeed, since its terminal would be part of a multiple structure having many uses, PA br. 21; they say petitioner may build anywhere in the harbor except the west side of Manhattan, p. 15, but that it may not build because that would destroy the plan of consolidation, p. 39; and they say petitioner can realize its project by "promoting its concept with twelve of the carriers", but that all carriers

must sign with them because otherwise their project is not viable, p. 15.

The confusion in all these positions stems from refusal to recognize that the best chance of commercial success lies in providing the superior facility. New toll bridges and highways rely on being the most direct and comfortable passage, not on prohibitions against the use of alternative pathways, for the protection of their bond issues.

Respectfully submitted,

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